FILED
JAN 2 1974
MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-235

MARCO DE FUNIS and BETTY DE FUNIS, his wife;
MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife;
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,
Defendants-Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED AUGUST 3, 1973
CERTIORARI GRANTED NOVEMBER 19, 1973

CRAFTSMAN & METPRESS SEATTLE, WASHINGTON

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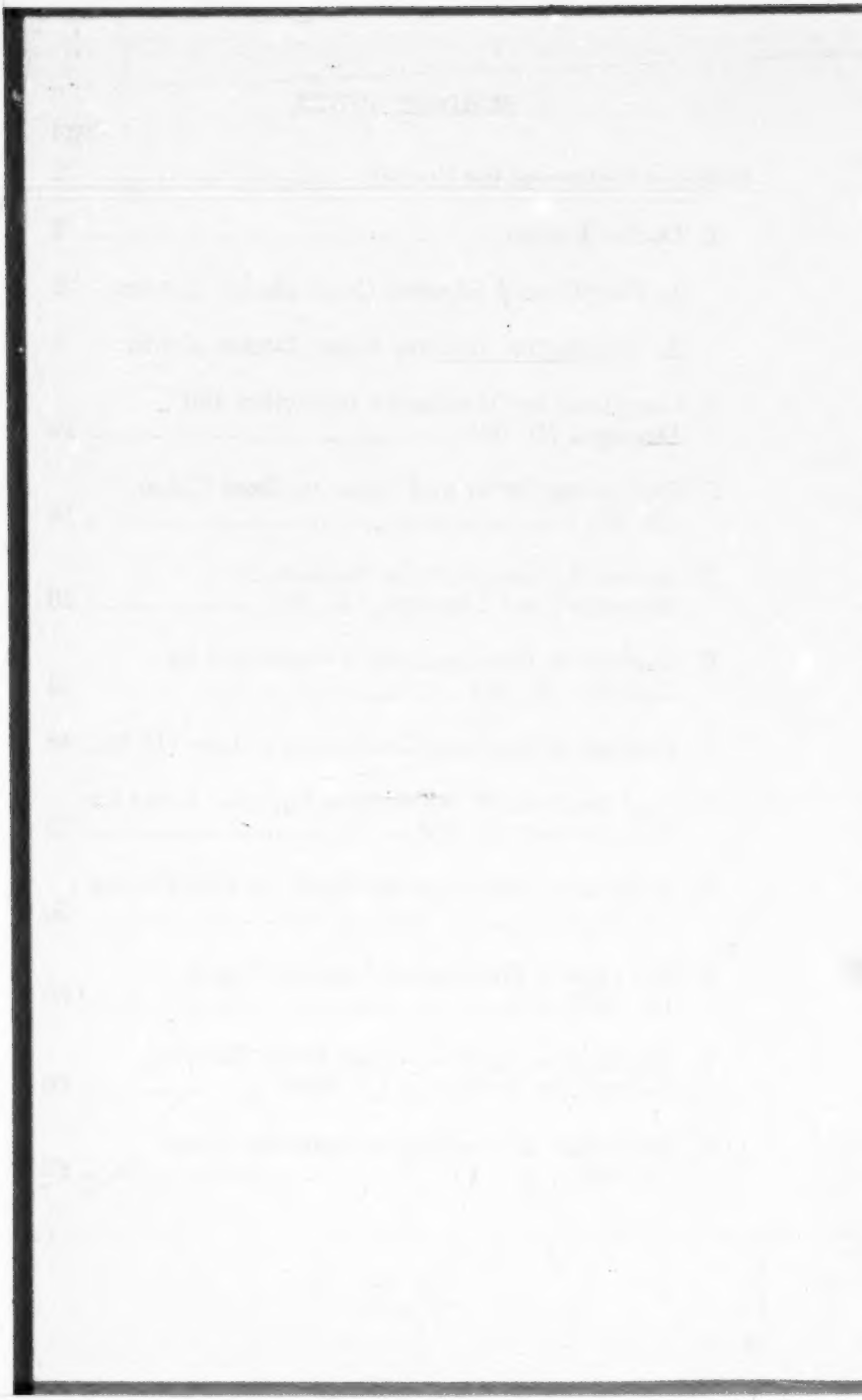

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SINGLE APPENDIX

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RELEVANT PORTIONS OF THE RECORD

A. DOCKET ENTRIES

1. KING COUNTY SUPERIOR COURT DOCKET ENTRIES

MARCO DE FUNIS and BETTY DE FUNIS, his wife; MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,

Plaintiffs,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,

Defendants.

No. 741727

CIVIL APPEARANCE DOCKET

1971	
Aug. 19	Summons & Complaint
Aug. 19	Order to show cause August 25
Aug. 23	Motion to Dismiss
Aug. 23	Appearance—all (Slade Gorton, James B. Wilson, John Lackland)
Aug. 25	Affdt of Richard O. Kummert
Aug. 25	Ent'd—Temp. Restraining Order & Order to Show Cause
Aug. 27	Order Setting Case
Aug. 30	Interrogatories to Defendant
Sept. 3	Affidavit of Richard O. Kummert
Sept. 9	Notice to Produce Documents
Sept. 13	Answer for Mandamus, Injunction and Damages

Sept. 13	Answers to Interrogs by Defendants
Sept. 15	Deposition of Richard Roddis—Published
Sept. 22	Plaintiffs Exhibits 2-5; 15-42 Defendants Exhibits 1;6-14;43-46, Received
Sept. 22	Entd hrg: Court Finds for Plaintiff (8) Shorett
Oct. 4	Oral Decision
Oct. 8	Ent'd: Objections to Findings & Conclusions—(8) Shorett Granted in part & Denied in part
Oct. 8	Deft's Proposed Findings of Fact & Conclusions Offered & Refused
Oct. 8	Findings of Fact & Conclusions—Offered & Refused
Oct. 8	Judgment—Offered & Refused
Oct. 13	Order auth. substitution of Xerox copies for certain exhibits
Oct. 18	Findings & Conclusions
Oct. 18	Judgment
Oct. 18	Cost Bill
Oct. 20	Notice of Appeal
Oct. 26	Praecipe for Transcript
Nov. 2	Cost bond on appeal
1972	
Jan. 5	Entd: Transc, statement of facts, Vol I
Jan. 5	Entd: Transc, statement of facts, Vol II
Jan. 7	Statement of Facts—rec'd
Jan. 28	Vols. I, II & III Statement of Facts, settled & Signed. (Shorett)
1973	
May 17	Remittitur
June 7	Certified Copy of Order by Supreme Court

2. WASHINGTON SUPREME COURT DOCKET ENTRIES

Nov. 11, 1971	Transcript
Jan. 7, 1972	Proposed Statement of Facts filed in King County Clerk's Office on January 3, 1972
Jan. 11, 1972	Notation granting Professor Arval A. Morris authority to file an amicus curiae brief on behalf of himself but not on behalf of the AAUP. Professor Morris' brief must be served by the time appellants' brief is filed.
Jan. 12, 1972	Statement of Facts filed in King County Clerk's office on January 3, 1972
Jan. 19, 1972	Notation granting Mr. Jorgen G. Bader authority to file a brief of amicus curiae. Mr. Bader shall have until two weeks after service of appellant's brief in which to file an amicus curiae brief
Jan. 24, 1972	Brief of Amicus Curiae (25) and Service —(Arval A. Morris)
Jan. 27, 1972	Application for Permission to file Brief Amicus Curiae (John Gant)
Jan. 27, 1972	Notation Order granting permission to file brief amicus curiae on condition petitioners coordinate with counsel U of W and other amicus curiae to avoid repetition. (John Gant)
Jan. 27, 1972	Request for permission to exceed the limitation on the number of pages contained in answering brief (Rule I-42(f)), but not to exceed 100 pages. (Lyle L. Iversen)
Jan. 27, 1972	Notation requesting that respondent renew his request after the briefs of appellant and amici have been filed so that an estimate of the number of additional pages desired may be indicated.
Feb. 2, 1972	Application of Philip L. Burton for Permission to file Brief Amicus Curiae.

Feb. 2, 1972	Notation authorizing Mr. Burton to file an amicus curiae brief on the condition that the effective coordination be accomplished with counsel for appellant and insofar as possible with other amici curiae to eliminate tautology and that the brief is filed within two weeks after appellant's opening brief to provide respondent the opportunity to reply to amicus curiae in his answering brief.
Feb. 2, 1972	Application for permission to file Brief Amicus Curiae (Michael Rosen and Sanford Jay Rosen)
Feb. 2, 1972	Notation granting permission to Michael Rosen and Sanford Jay Rosen to file amicus curiae briefs (Michael H. Rosen on the condition that he coordinate with counsel for appellant and insofar as possible with other amici curiae to eliminate repetition in argument. That his brief is filed within two weeks after appellant's opening brief is filed to provide respondent the opportunity to reply in his answering brief.) (Mr. Sanford J. Rosen authority to associate with Mr. Michael H. Rosen in the filing of an amicus curiae brief if the conditions of APR 7 are met.)
Feb. 7, 1972	Notation order granting Michael Rosen permission to file amicus briefs of the ACLU in mimeograph form.
Feb. 10, 1972	Brief of Appellants (25) and Service
Feb. 15, 1972	Petition for Permission to file Brief Amicus Curiae (John Sennhauser)
Feb. 15, 1972	Notation granting permission to John H. Sennhauser to file brief Amicus Curiae on the following conditions: a. That effective coordination be accomplished with counsel for appellant and as far as possible with other amicus curiae to eliminate tautology. b. That the brief

	is filed by March 24, 1972, to provide respondent the opportunity to reply to amicus curiae in his answering brief.
Feb. 1, 1972	Permission requesting authority to file amicus briefs (Young Lawyers Section of the Seattle King County Bar Association)
Feb. 1, 1972	Notation granting permission to file amicus briefs.
Feb. 22, 1972	Amicus Brief (28) and Service (Young Lawyers Section Seattle King County Bar Association)
Feb. 18, 1972	Application for leave to file typewritten and photo-copied brief (John Gant)
Feb. 18, 1972	Notation granting authority to Mr. John Gant to file amicus curiae brief in accordance with ROA I-42(b)
Feb. 22, 1972	Motion for Authority to Appear as Amicus Curiae and to Permit the Appearance of Counsel
Feb. 22, 1972	Notation granting Joseph H. Gordon and Grant Armstrong authority to file an amicus curiae brief provided the brief is served on counsel for respondent by February 24, 1972. Chief Justice has also authorized Kenneth J. Burns, Robert M. O'Neill and Harry Reese (out of state counsel) to associate with Mr. Gordon and Mr. Armstrong on the amicus brief.
Feb. 23, 1972	Brief of Michael H. Rosen and Sanford Jay Rosen as Amici Curiae (25) and Service
Feb. 24, 1972	Brief of Amici Curiae (25) and Service (Joseph H. Gordon, Grant Armstrong) (Kenneth J. Burns, Jr., Robert M. O'Neil and Harry B. Reese—out of state)

Feb. 24, 1972	Brief of Amicus Curiae (26) and Service (Jorgen G. Bader, Assistant Corporation Counsel)
Feb. 24, 1972	Brief of the Mexican American Legal Defense and Education Fund as Amicus Curiae (John Gant and Mario Obledo) (25) and Service
Feb. 24, 1972	Brief of Amicus Curiae (25) and Service (Officers and Trustees of the Seattle King County Bar Association (Jack P. Scholfield, et al.)
Feb. 24, 1972	Request for permission to file a brief amicus curiae by George Constable
Feb. 24, 1972	Notation denying request if brief would be in support of appellant because of the time schedule. If the position of respondent is to be supported authority to file an amicus curiae brief is granted if the brief is filed by March 24, 1972.
Feb. 24, 1972	Brief Amicus Curiae (26) and Service (Sennhauser)
Feb. 24, 1972	Affidavit and Request for Judicial Notice
Feb. 24, 1972	Brief of Amicus Curiae (25) and Service —(Philip L. Burton)
March 1, 1972	Permission to file a brief amicus curiae (Robert Baronsky)
March 1, 1972	Notation granting permission to Robert Baronsky to file an amicus curiae brief on the understanding that Mr. Baronsky will support the position of respondents, and the brief is to be filed by March 24, 1972, to provide the appellants an opportunity to answer the argument of amicus curiae in a reply brief if they so desire.
March 2, 1972	Motion to Strike Briefs Amicus Curiae (9) and Service
March 2, 1972	Notice of Motion

March 2, 1972	Set for consideration on March 17, 1972 (Respondent's Motion to Strike Briefs Amicus Curiae)
March 3, 1972	Motion to strike brief Amicus Curiae of Young Lawyers Section, Seattle-King County Bar Association
March 3, 1972	Notice of Hearing on Motion
March 3, 1972	Set for consideration on March 17, 1972 (Motion to strike amicus curiae brief of Young Lawyers Section, Seattle-King County Bar Association)
March 7, 1972	Brief of Respondents on Motion to strike Amicus Curiae Briefs (10) and Service
March 9, 1972	Motion to strike Amicus Curiae Brief (5) (of Arval A. Morris) and Notice for Motion Docket
March 9, 1972	Affidavit of Service by mail
March 9, 1972	Set for consideration on March 17, 1972 (Motion to strike amicus curiae brief of Arval A. Morris)
March 13, 1972	Memorandum in Opposition to Motion to Strike Amicus Curiae Brief (10) and Service (Assistant Corp. Counsel—The City of Seattle)
March 13, 1972	Response to Respondent's Motion to Strike Brief Amicus Curiae of Young Lawyers' Section, Seattle-King County Bar Association (25)
March 14, 1972	Memorandum in Opposition to Motion to Strike Amicus Curiae Brief of Arval A. Morris (15)
March 15, 1972	Memorandum in Opposition to Motion to Strike Amicus Curiae Brief (10) and Service
March 15, 1972	Brief in Opposition to Motion to Strike Brief Amicus Curiae (10)
March 16, 1972	Responding Memorandum of American Indian Law Students, Inc., et al., on Motion to Strike Amicus Curiae Briefs (6) and service

March 17, 1972	Motion to admit Arval A. Morris for purposes of submitting a Brief Amicus Curiae (5)
March 17, 1972	Notation order denying Respondents' Motions to dismiss briefs Amicus Curiae 13/263
March 17, 1972	Notation order granting Motion to admit Arval A. Morris for purposes of submitting a Brief Amicus Curiae 13/263
March 22, 1972	Stipulation to extend time for serving and filing Respondents' Brief (extended to April 13, 1972)
March 24, 1972	Brief of George Constable, Amicus Curiae (26) and Service (on behalf of respondent)
March 24, 1972	Request for permission to file a brief amicus curiae on behalf of the respondent representing the National Jewish Community Rights Council, Inc. (Jennings P. Felix)
March 24, 1972	Notation order granting permission to Jennings P. Felix to file a brief amicus curiae
March 24, 1972	Brief of amicus curiae (26) and Service (Robert Baronsky)
March 24, 1972	Brief of amicus curiae (26) and Service Jennings P. Felix)
March 30, 1972	Request of Mr. Potts to file brief Amicus Curiae
March 30, 1972	Notation order granting Mr. Potts permission to file amicus brief
March 30, 1972	Brief of amicus curiae (Mr. Ralph B. Potts) (26) and Service
April 6, 1972	Request to file Amicus curiae brief on behalf of defendants (G. Robert Brain)
April 6, 1972	Notation granting permission to file brief of Amicus Curiae to Mr. Brain on the condition it is filed by April 13, 1972.

April 7, 1972	ENTERED—Set for hearing May 15, 1972—En Banc
April 11, 1972	Brief of Respondents (25) and Service
April 11, 1972	Brief of Amici Curiae (G. Robert Brain (15) and Service
April 24, 1972	Statement of Facts (three volumes)
April 24, 1972	Exhibits A-61
May 1, 1972	Reply Brief of Appellants (25)
May 2, 1972	Affidavit of Service by mail
May 2, 1972	Letter of May 1, 1972, requesting permission to file a reply brief two pages over the limit set by the Court's rule (James B. Wilson)
May 3, 1972	Notation Order granting permission to file a brief two pages over the limit
Nov. 24, 1972	Lyle Iversen's letter of November 21, 1972 and Service
March 8, 1973	Opinion—Reversed—En Banc
March 15, 1973	Cost of Bill and Service
April 2, 1973	Petition for Rehearing (12)
May 16, 1973	Order Denying Petition for Rehearing 63/372
May 16, 1973	Remitted 60/395
May 24, 1973	Application for Allowance of Appeal and Stay
May 24, 1973	Notice of Appeal to the Supreme Court of the United States of in the Alternative Notice of Application for Writ of Certiorari
May 25, 1973	Notice of Praecipe for Supplemental Transcript on Appeal to the Supreme Court of the United States and service
May 29, 1973	Notation Order "The position for a stay pending an appeal or disposition of a petition for writ of certiorari addressed to the U.S. Supreme Court is denied. The motion for authority to use original

records filed in the Supreme Court for inclusion in the transcript to be sent to the Supreme Court is granted conditioned on counsel for plaintiffs-appellants, Marco DeFunis assuming the obligation of causing the return of this Court's records upon conclusion of the action by the U.S. Supreme Court."

B. COMPLAINT FOR MANDAMUS, INJUNCTION AND DAMAGES (R. 94)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

(Title Omitted)

Plaintiffs allege:

1. That the plaintiffs, Marco De Funis and Betty De Funis, his wife, are husband and wife and have been residents and taxpayers of Seattle, King County, Washington for more than 50 years. That the plaintiffs, Marco DeFunis, Jr. and Lucia DeFunis, his wife, are husband and wife and are taxpayers and residents of Seattle, King County, Washington for more than 20 years.

2. That the plaintiff Marco De Funis, Jr. is a graduate of the public elementary and high schools located in Seattle, Washington, and was graduated from the University of Washington in 1970 with a Bachelor of Arts degree.

That said plaintiff graduated from Franklin High School in Seattle with close to a straight "A" or 4. grade average; that he graduated from the University of Washington with an overall grade point average of 3.62 out of a possible 4.; his junior-senior year grade average was 3.71 and the grade point average in his major, political science, was 3.85. He was graduated from the University of Washington Phi Beta Kappa (highest scholastic honorary) and Magna Cum Laude.

3. That the defendant Charles Odegaard is president of the University of Washington; that Harold S. Shefelmann and the others named in this complaint are members of the Board of Regents of the University of Washington; that Richard Kummert, Robert S. Hunt and Richard L.

Roddis are members of the Admissions Committee for the admitting of students to the Law School; that Richard L. Roddis is Dean of the Law School. That the defendant University of Washington is a state owned and supported educational institution maintained and paid for by taxpayers of the state of Washington. That Harold Gardiner is the Registrar of the University of Washington and supervises the admission of students to attend classes at the University of Washington Law School.

4. After graduating from the University Magna Cum Laude in 1970, plaintiff Marco De Funis, Jr. attended graduate school at the University of Washington during the year 1970-1971, and his grades during the full year of graduate school were straight "A" or 4.; his marks in many courses being "A+" with comments by the professors that his work was exceptional.

5. Plaintiff Marco DeFunis, Jr., in addition to achieving exteremely high scholastic grades and honors, worked part time in order to continue in the University, working 20 to 40 hours per week during the school year and at the same time engaged in teaching Sunday school.

6. That the plaintiff Marco DeFunis, Jr. is 22 years of age, is married, and has always resided in Seattle, King County, Washington. That the plaintiff Lucia DeFunis, wife of plaintiff Marco DeFunis, Jr., is employed as a dental technician in Bellevue, Washington.

7. That the plaintiff Marco DeFunis, Jr. applied for admission to the University of Washington Law School after graduation from the University of Washington, in the Fall of 1970. He was not accepted, but was placed on the class admissions waiting list, and after waiting until the late

summer months of 1970, said plaintiff was denied admission to the Law School for the Fall term beginning 1970. At that time, said plaintiff was advised that he would have a better chance of attending Law School with class entering in the Fall of 1971. Thereafter, said plaintiff attended graduate school at the University of Washington, where, as alleged, during the 1970-71 school year he received a straight "A" average for the full graduate year.

8. Plaintiff Marco DeFunis, Jr. again applied to the University of Washington Law School for admission in the Fall of 1971. Said plaintiff's admission credentials included, in addition to the high scholarship records achieved as an undergraduate and his one year graduate school record as set forth above, his law school aptitude test score of 668, which said plaintiff is advised is within the top 7% of all law school applicants having taken the test in the past several years.

9. That plaintiff Marco DeFunis, Jr. was again denied admission to the Law School, this time for the class beginning in the Fall of 1971, and was put on the waiting list for a second time. On August 2, 1971, said plaintiff was notified by letter from defendant Robert S. Hunt, Associate Dean and professor of law at the University of Washington Law School, advising him that he had not been selected for the Law School class entering in the Fall of 1971.

10. That of the candidates selected and presently in line for admission to the 1971 Law School class at the University of Washington, are many candidates whose qualifications and credentials are much below the credentials and qualifications of the plaintiff Marco DeFunis, Jr.; that many of the students that the Law School contem-

plates accepting in the class beginning in the Fall of 1971 are not residents and taxpayers of the state of Washington, and their parents are not and never have been residents and taxpayers of the state of Washington. That the plaintiffs are informed and believe that in excess of 25% of those who are accepted by the Law School, and in lieu of the plaintiff Marco DeFunis, Jr., are not taxpayers or residents of the state of Washington. That said plaintiff's credentials and qualifications are higher and better than many others being admitted to the law class by the University of Washington.

11. That the University of Washington Law School is a state institution supported by the taxpayers and residents of the state of Washington; and taxpayers and residents of the state of Washington are entitled to preference for admission to the state University. At other schools at the University of Washington preference is given to taxpayers and residents of the state of Washington. That failure on the part of the defendants to admit said plaintiff to the Law School is unjust discrimination in favor of nonresidents, nontaxpayers, and students who do not have the qualifications and credentials possessed by said plaintiff. There is no question but that said plaintiff is fully qualified, competent, and capable of making a very creditable showing in Law School and successfully completing the Law School course in a satisfactory manner and probably as an honor student.

12. That the plaintiff Marco DeFunis, Jr. has previously made application for admission to Law School at the following universities, to-wit:

University of Oregon

University of Idaho

Gonzaga University
Willamette University

and has been accepted as a student in each of said Law Schools where he has made application. That said plaintiff may attend one of said law schools, which would require his residence away from his home during the school years.

13. The action of the defendants in denying said plaintiff admission to the University of Washington School of Law, class of 1974, in the Fall of 1971, will cause the plaintiffs undue hardship, permanent loss and damages. That said plaintiff and his wife to live out of the state of Washington to attend law school will require him to pay out of state tuition fees, incur substantial additional living costs and expenses during the school years for himself and his wife; cause the loss of his part time employment in the city of Seattle, and cause his wife to lose her position and income as a dental technician; that said monetary loss alone during the school year for the three years of law school, would exceed $7,500 per year, or a total of $22,500. That the plaintiffs are unable to afford the extra cost and expense of the plaintiff Marco DeFunis, Jr. attending law school as a nonresident student in another state.

14. That the said plaintiff, upon completing law school, would practice law in the State of Washington, and for that reason would be further handicapped by attending law school elsewhere; that the action of the defendants may well terminate and forever end the opportunity and ambition of said plaintiff to practice law as his chosen profession. That it would not be possible to measure the loss of earnings and damages that will be sustained by said plaintiff by the wrongful acts of the defendants.

15. That the plaintiffs heretofore requested of the defendants a record of the credentials and qualifications and residence of each of the students (without specifying any names) that the defendants have refused and failed to make such information available to the plaintiffs. That the defendants have indicated that even though the defendant University of Washington is a state supported university, that all of those admitted to the Law School class could be non-residents and nontaxpayers of the state of Washington if the admissions committee so determined, and even though competent, capable and qualified students who are and whose parents are taxpayers and residents of the state of Washington are eligible and desirous of attending the University of Washington and the Law School.

16. That defendants have acted unjustly and without considering the welfare of taxpayers and residents of the state of Washington and those who have supported and paid for the defendant University of Washington over many years in selecting students for admission to the Law School.

17. That the plaintiffs Marco DeFunis and Betty DeFunis, his wife, are justified in requesting and requiring that after having paid for and supported the University of Washington for more than 50 years, that their fully qualified, capable and competent son, who was graduated from the University of Washington Magna Cum Laude and with records and qualifications in excess of at least many of those being admitted to the Law School, be admitted to the University of Washington Law School.

18. That said plaintiff, Marco DeFunis, Jr., was wrongfully passed over for the Law School class beginning in

1970, and after being advised that he should make application for admission in the Fall of 1971, and spending an additional year as a graduate student in the University, making grades of straight "A" and "A+", should not now be denied admission to the Law School.

WHEREFORE, plaintiffs request that the defendants be ordered and directed to admit and enroll the plaintiff Marco DeFunis, Jr., to the defendant University of Washington Law School in the Fall of 1971, and that upon the failure of said defendants to accept and admit said plaintiff as a student to said Law School, that the plaintiffs recover damages in the sum of not less than $50,000, together with their costs and disbursements herein to be taxed as against the defendants and each of them; and that the plaintiffs have such other and further relief that may be just and equitable.

By JOSEF DIAMOND
LYCETTE, DIAMOND & SYLVESTER
Attorneys for Plaintiffs

(Verification omitted)

C. RESTRAINING ORDER AND ORDER TO SHOW CAUSE (R. 92)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

(Title Omitted)

THIS MATTER having come on for hearing before the undersigned, one of the judges of the above entitled court, upon the motion of the plaintiffs for a restraining order and order to show cause to be directed to the defendants; the court having read the complaint of the plaintiffs in support of said motion and being duly advised in the premises, now, therefore, it is hereby

ORDERED, that each of the above named defendants be, and they are hereby restrained from selecting students for admission to the Law School of the University of Washington during the pendency of this action; and it is further

ORDERED, that each of the above named defendants be, and they are hereby directed to be and appear in the courtroom of the Honorable Howard J. Thompson, judge, Room No. E-813, King County Courthouse, Seattle, Washington, on the 25th day of August, 1971, at the hour of 9:30 o'clock A.M., or as soon thereafter as counsel may be heard, then and there to show cause, if any there be, why the restraining order herein should not be made permanent, until the plaintiff herein, MARCO DE FUNIS, JR. is admitted as a student to the law school of the University of Washington.

The plaintiffs shall file a bond as security in the sum of $200.00.

DONE IN OPEN COURT this 19th day of August, 1971.

HOWARD J. THOMPSON
Judge

(Names of presenting and approving counsel omitted)

D. ANSWER TO COMPLAINT FOR MANDAMUS, INJUNCTION AND DAMAGES (R. 55)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

(Title Omitted)

COME NOW the defendants and answering the complaint of the plaintiffs admit, deny and allege as follows:

1. Answering paragraphs 1 and 2 of plaintiffs' complaint, defendants admit that plaintiffs are residents of the State of Washington, and that plaintiff, Marco De Funis, Jr., is a graduate of the University of Washington with a major in Political Science with an overall grade point of 3.62, junior-senior year grade point of 3.71 and that he was inducted into the University of Washington chapter of Phi Beta Kappa and was given Magna Cum Laude honors when he was awarded his baccalaureate degree. In all other respects defendants deny the allegations in paragraphs 1 and 2 thereof.

2. Answering paragraph 3 of plaintiffs' complaint, defendants admit that Charles Odegaard is president of the University, that Harold S. Shefelman, James R. Ellis, R. Mort Frayne, Robert L. Flennaugh, Jack G. Neupert, Robert F. Philip and George V. Powell are Regents of the University of Washington, that Richard L. Roddis is Dean of the Law School, that Richard Kummert and Robert S. Hunt are Professors of the University's Law School and members of the Admissions Committee of the Law School; and that the University of Washington is a state-owned institution of higher education in the State of Washington. In all other respects defendants deny the allegations in paragraph 3 thereof.

3. Answering paragraphs 4, 5 and 6 of plaintiffs' complaint, defendants admit that plaintiff Marco De Funis, Jr. attended classes and was enrolled at the University of Washington during the year 1970-71 taking graduate courses in Political Science for which he was awarded grades of "A". Having insufficient knowledge of the other allegations of said paragraphs to know their truth or falsity, defendants deny the same.

4. Answering paragraphs 7, 8 and 9 of plaintiffs' complaint, defendants admit that said plaintiff Marco De Funis, Jr. applied for admission to the University of Washington Law School for the Fall of 1970 and for the Fall of 1971; that he was placed on a waiting list for admission for the class entering 1970, and again placed on the waiting list for admission for the class entering 1971; that he was denied admission to both such classes; that he was advised by Associate Dean Robert S. Hunt during August of 1971 of his failure to be admitted to the 1971-72 First Year Law Class; and that his score on the third taking of the Law School Admissions Test since August 1969 was 668, which score is the 93rd percentile of scores achieved by persons taking the Law School Admissions Test within the last three years. Except as previously admitted herein, defendant denies each and every other allegation contained in said paragraphs.

5. Answering paragraph 10 of plaintiffs' complaint, defendants admit that some of those applicants admitted to the Law Class commencing the Fall of 1971 are not residents of the State of Washington and that some parents of students admitted are not residents of the State of Washington and deny each and every other allegation therein contained.

6. Defendants admit they refused to provide detailed information requested by plaintiffs on June 8, 1971 and except as heretofore admitted herein, defendants deny each and every other allegation contained in plaintiffs' complaint.

WHEREFORE having fully answered the complaint of the plaintiffs herein, defendants pray that the same be dismissed with prejudice and with costs awarded to the defendants.

DATED THIS 9th day of September, 1971.

SLADE GORTON, Attorney General
State of Washington
By JAMES B. WILSON

E. ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFFS (R. 35)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

(Title Omitted)

COMES NOW the defendants and answer the Interrogatories heretofore propounded by plaintiffs.

1. List in tabular form below or on separate schedule the candidates admitted to and on the waiting list for admission for the Law School class of 1974 as of August 1, 1971, indicating:

(a) their junior-senior year grade point averages,
(b) their law school admission test scores,
(c) their writing ability scores,
(d) their predicted first year law school averages,
(e) whether the candidate is from out of states,
(f) whether the candidate is from a minority group

which is receiving special consideration for admission to law school,

(g) whether the candidate has been admitted to the University of Washington School of Law for the class of 1974 as of August 30, 1971.

ANSWER: Schedule A attached sets forth for the separate groups of candidates admitted to and on the waiting list for admission for the Law School class of 1974 as of August 1, 1971, the following information as indicated by our records:

(a) A grade point average computed for each such candidate using the grades earned in his junior and senior years. We use the annual grade point averages computed by the Law School Data Assembly Service (a division of Educational Testing Service) for each such candidate in reaching the average for the two years. We assume that the combined average, rather than the individual yearly averages, is therefore sought under plaintiff's interrogatory 1(a).

In making its calculation of a candidate's grade point average, the Law School Data Assembly Service routinely deletes grades in physical education, ROTC, practical music and practical art courses.

The combined averages presented are the result of analysis of those transcripts presented by the Law School Data Assembly Service and forwarded to the Committee on Admissions and Readmissions ("the Committee") up to the time that determination of admission or waiting list status was made by the Committee. In many cases, such transcripts did not cover the applicant's full senior year because the applicant's senior year was only partly

complete by the application deadline of March 15, 1971. We have not revised such grade point averages to reflect later receipt of complete senior year transcripts.

(b) The figure representing the candidate's Law School Admission Test Score component used by the Committee in calculating the candidate's predicted first year average. In the event the candidate had taken the Law School Admission Test on more than one occasion within the last four years, the figure appearing in column (b) is the average of the test scores the candidates received. If the applicant has only taken the test once in the last four years the figure appearing in column (b) is the applicant's test score.

(c) The figure representing the candidate's Writing Test Score component used by the Committee in calculating the candidate's predicted first year average. In the event the candidate had taken the Law School Writing Test on more than one occasion within the last four years, the figure appearing in colum (c) is the average of the test scores the candidate received. If the applicant has only taken the Writing Test once in the last four years the figure appearing in column (c) is the applicant's test score.

(d) The candidate's predicted first year law school average. This average is the sum of 51.3, 3.4751 times the combined junior-senior grade point average, .0159 times the figure representing the Law School Admission Test Score component, and .0456 times the figure representing the Writing Test Score component.

(e) We have assumed that the question "whether the candidate is from out of state" implies domicile issues of

the type presented in interrogatory 2 rather than a determination as to whether the applicant at the time the application was filed happened to be out of state. We have insufficient information from which to determine any applicant's domicile. We do maintain records of applicants' state of permanent mailing address and have used this as the best approximation we can produce of the applicants' domicile. Where the applicant's permanent mailing address is outside the State of Washington, colume (e) below will show "yes."

(f) Where the candidate is a member of a minority group which is receiving special consideration for admission to law school, column (f) below will show "yes."

(g) If the candidate has been admitted to the University of Washington School of Law for the class of 1974 as of August 30, 1971, column (g) below will show "yes."

2. The total number of applicants for admission and students admitted to the law school class of 1974 who are, and whose parents are not residents, nor taxpayers of the state of Washington.

ANSWER: We are uncertain as to what is required by this interrogatory. If the first clause was intended to be read as "the total number of applicants for admission and students admitted to the law school class of 1974 who are "[residents of Washington]" we do not have sufficient information from which to determine the domicile of each applicant or admitted applicant. However, based upon the assumption that the state of permanent mailing address is the state of "residence," the answers are 739 applicants,

and as column (e) in Schedule A indicates, 148 admitted students, are residents of Washington.

If the first clause was intended to be read "the total number of applicants for admission and students admitted to the law school class of 1974 who are [neither], and whose parents are [neither], residents, nor taxpayers [,] of the state of Washington," and if the state of permanent mailing address is assumed to be the state of "residence," then the answers to the first clause are 862 applicants, and as column (e) in Schedule A indicates, 127 admitted sudents are not residents of Washington.

With respect to the residence of the parents, while the Law School application form asks for the address of the applicant's parents, we have little occasion to verify such addresses (we do mail certain notices to applicants' permanent mailing addresses) and such addresses are often omitted from applications. Moreover, it is not clear where the residence of the parents would be relevant except where the parents of a non-resident (defined as above) admitted applicant reside in Washington. Nevertheless, examination of the applications of the 127 non-resident admitted applicants showed 5 had at least one parent who was a resident of Washington.

We have no information, apart from the state of assumed residence, from which we could make a judgment as to which applicants, admitted students, or parents are "taxpayers of the state of Washington."

3. The total number of law school applicants for the law school class of 1974; and the number of applicants admitted to the law school class of 1974.

ANSWER: The Law School received 1,688 applications from individuals for positions in the Law School class of 1974, of which only 1,601 were eventually supported by required supplementary documents (recommendations, transcripts, LSAT scores, etc.) and considered by the Committee on Admissions and Readmissions. As of September 9, 1971, the number of applicants admitted to the Law School class of 1974 is 293.

4. The relative position on the admissions or waiting list, grade point average, law school admission test score (the average score used in consideration for admission), writing score (average) and predicted first year law school grades for the plaintiff Marco DeFunis, Jr.

ANSWER: Plaintiff Marco De Funis, Jr. was denied admission to the Law School by letter dated August 2, 1971 (from Associate Dean Robert S. Hunt to Mr. De Funis) which reflected action taken by the Committee on Admissions and Readmissions on July 21, 1971. Therefore, Mr. De Funis as of September 9, 1971 has no position on either the "admissions or waiting list." However, Mr. De Funis was placed in the lowest quartile of the Law School's waiting list for the class entering fall 1971 on May 12, 1971 and remained there until the Committee's action on July 21, 1971.

Our records indicate that Mr. De Funis had a 3.71 combined junior-senior grade point average, an average Law School Admission Test score of 582 (representing the average of 512, 566, 668), an average Writing score of 61.3 (representing the average of 62, 58, and 64), and a predicted first year average of 76.23.

5. The names, position and addresses of all members of

the faculty, students, employees and officers of the University of Washington who are members of the Law School Admissions Committee or who have a voice or some role in selecting for or rejecting from and enrolling students into the University of Washington Law School, class of 1974.

ANSWER: As of September 9, 1971, the following are members of the Committee on Admissions and Readmissions of the Law School:

1. Richard O. Kummert, Professor of Law, Chairman of the Committee
   Address: 7733 - 29th Avenue N.E.
   Seattle, Washington 98105
2. William R. Andersen, Professor of Law
   Address: 7216 - 57th Avenue N.E.
   Seattle, Washington 98115
3. Geoffrey L. Crooks, Assistant Professor of Law
   Address: 2425 - 43rd Avenue West
   Seattle, Washington 98199
4. Robert L. Fletcher, Professor of Law
   Address: 5319 N.E. 43rd Street
   Seattle, Washington 98105
5. Robert S. Hunt, Associate Dean, Professor of Law
   Address: 1415 - 38th Avenue
   Seattle, Washington 98122
6. Gerald D. Joshua, Second Year Law Student
   Address: 1315 East Spring Street
   Seattle, Washington 98101
7. Rochelle Kleinberg, Third Year Law Student
   Address: 727 - 17th Avenue East
   Seattle, Washington 98102
8. Virginia B. Lynes, Assistant Professor of Law
   Address: 1856 East Shelby
   Seattle, Washington 98102
9. Tama Zorn, Second Year Law Student
   Address: 1719 - 26th Avenue East
   Seattle, Washington 98102

As of May 12, 1971, the date on which the Committee on Admissions and Readmissions placed Mr. De Funis on the waiting list for the class entering fall, 1971, the members of the Committee were Professors Kummert, Andersen, Crooks and Fletcher, Dean Hunt, Rochelle Kleinberg, and Vincent A. Hayes, 3849-156th Avenue S. E., Bellevue, Washington 98004, a first year law student.

As of July 21, 1971, the date on which the Committee denied admission to Mr. De Funis, the members of the Committee were Professors Kummert, Andersen, Crooks, Fletcher and Lyness, Dean Hunt, Rochelle Kleinberg and Tama Zorn.

With respect to individuals "who have a voice or some role in selecting for or rejecting from and enrolling students into the University of Washington Law School, class of 1974," the entire faculty of the School of Law has "a voice or some role" in the sense that general admission standards and policies result from faculty action and that the faculty elect the members of the Committee on Committees, which is responsible, along with Dean Roddis of the School of Law, for the selection of faculty members of the Committee. Also, a number of administrative and clerical personnel at the University of Washington have "some role" in the sense that these individuals collect and process the various documents, records, letters and papers that are connected with the decision to admit or reject particular applicants to the School of Law.

6. A detailed statement setting forth in full, reasons for the denying the plaintiff Marco DeFunis, Jr. admission to the law school class of 1974.

ANSWER: The Committee on Admissions and Read-

missions ("the Committee") decided in early October 1970 upon the following general procedures for the review of applications for the Law School class entering in fall of 1971:

a. The Committee would review applications of the most promising applicants each time 25 to 30 of such applications were finished processing and ready for review. Each of such files would be assigned to a Committee member for thorough review and for presentation of the file to the Committee. On the basis of last year's applicant group, the Committee decided that most promising applicants would be defined as applicants with predicted first year law school averages over 77.

b. The Chairman would review all applications of candidates with predicted first year averages below 74.5, except for minority and military (defined below) applicants, and would either (a) reject such applicants or (b) place such applicants in with a group for later review by the Committee. The decision as to which category such an applicant fell depended on whether in the Chairman's judgment there was information in the applicant's file indicating that the applicant had significantly better potential for law study than the relatively low predicted first year average tended to indicate. Cases of doubt were to be resolved in favor of deferring judgment until Committee review could be undertaken.

c. Applicants with predicted first year averages between 74.5 and 76.99 were to be accumulated until the great majority of applications filed were complete and ready for review, so that the critical decisions as to the margin of the incoming class could be made with a reltively complete view of remaining qualified applicants.

Under these operating procedures, Mr. De Funis' application, presenting a 76.23 predicted first year average, was placed in the third category and was not reviewed until the Committee undertook its major review of applications in a series of meetings in May, 1971.

Prior to these May meetings, the Committee met on February 24, 1971, March 29, 1971 and April 12, 1971 to review applicants with predicted first year averages over 77, military applicants (*i.e.*, applicants who had previously been accepted by the Law School, who had been unable to attend because of induction into military or alternative service, who had been honorably discharged, and who reapplied to the Law School for admission in the first fall following separation from service, or students who had begun attendance at the law school but who were forced to withdraw before first year examinations because of induction into military service), and outstanding minority applicants. During these meetings, the Committee admitted 78 applicants with predicted first year averages over 77, 19 military applicants, and 4 minority applicants. At the same time, the Committee deferred action on 7 applicants with predicted first year averages over 77 feeling that such applicants were not as promising as their predicted first year averages seemed to indicate.

In preparation for the major review of applications in mid-May, each Committee member was assigned approximately 75 files of individuals not qualifying for minority group status or military status with predicted first year averages ranging from 74.5 on up to in some cases 79 (the applications in such group with predicted first year averages over 77 having been completed and made ready for review subsequent to the meeting of April 12, 1971). Each

Committee member was asked to review these files and to rank them with a view to recommending to the Committee approximately 10 of the applicants for admission, recommending approximately 25 of the applicants for a position on a waiting list, and recommending that the remainder of the applicants be denied. Each of the members of the Committee complied with this request and appeared at a meeting of the Committee held on May 10, 1971 with such selections having been made from among the files assigned. The Committee then determined that, as an overall check upon the process, all files would be presented to the Committee in order of their predicted first year average, irrespective of the recommendations of the Committee member reviewing the file. It was felt that this procedure would result in the fairest comparisons that could be made between prospective candidates, while at the same time offering encouragement to the Committee member reviewing the file to offer complete justification as to why his recommendation regarding the applicant might have been different than the applicant's relative ranking based only on the predicted first year average would suggest. As a result of this process, on May 12, 1971 the Committee after having considered at meetings on May 10, May 11, and May 12 to that point 168 applications with predicted first year averages higher than Mr. De Funis' average, which number included a number of applications with predicted averages quite close to the predicted first year average of Mr. De Funis, reviewed the application of Mr. De Funis and placed him in the lowest quartile of its waiting list. The Committee's meetings concerning this group of files continued on May 13, 14 and 17 during which time the Committee reviewed files in order of predicted first year average down through the lowest ranked applicant on such

scale recommended by a Committee member for a waiting list position.

On June 15, 1971, the Committee met to review applications completed since its May meetings, to review minority applicants on the waiting list and to reconsider Mr. De Funis' position on the waiting list at the request of Mr. De Funis and his counsel and in view of a letter from his doctor concerning his condition at the time of his first LSAT test. It determined that his waiting-list position should remain unchanged.

Finally, on July 21, 1971, the Committee met to accept, and did accept 25 applicants from the first quartile of the waiting list and to determine which applicants ought to be continued on the waiting list in view of possible vacancies that might occur between that date and the beginning of school. It determined that it would have no occasion to admit applicants from the lowest two quartiles on the waiting list. Thus, the Committee on that date denied admission to Mr. De Funis and the other individuals previously in the third and fourth quartiles of the waiting list.

The Committee's reasons for denying Mr. De Funis are that it found no reason to adjust his ranking in the applicant population as indicated by the predicted first year average and that on this basis Mr. De Funis' application was below the group we accepted without special attributes being present. The latter point perhaps is made clearer by the following table of applications received and applications accepted for various levels of predicted first year averages:

Predicted First Year Average	Number of Applications Received	Number of Applications Accepted (to August 31, 1971)
81	1	1
80	2	2
79	11	11
78	42	42
77	105	93
76	169	53
75	210	22

The percentage of applications received that were accepted by the Committee drops sharply when predicted average is below 77. Indeed, it is noteworthy how the 53 people accepted with predicted first year average of 76 are distributed throughout the group of applicants with such predicted averages:

76.90 - 76.99	17	11
76.80 - 76.89	12	6
76.70 - 76.79	16	9
76.60 - 76.69	16	7
76.50 - 76.59	16	5
76.40 - 76.49	16	8
76.30 - 76.39	34	3
76.20 - 76.29	9	2
76.10 - 76.19	15	1
76.00 - 76.09	19	1

These data indicate that the Committee accepted few applicants with predicted first year averages reasonably close to that of Mr. DeFunis (76.23).

In selecting the applicants that it did accept in this narrow range, the Committee used the process described in its "Guide For Applicants," a copy of which Mr. De Funis received with his 1971 application:

> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis

of their ability to make significant contributions to law school classes and to the community at large.

We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

In making the judgments thus required, the Committee sought those outstanding characteristics or qualifications not possessed by most of the other applicants with reasonably comparable predicted first year averages. For example, in determing the possible impact that the quality of an applicant's undergraduate school might have upon his apparent ranking based on predicted first year averages, the Committee's basis of comparison was the quality of the University of Washington, the Law School's primary source of applicants. In assessing the possible impact that an unusually demanding curriculum might have on an applicant's apparent ranking, the Committee's base for comparison was the demands imposed on a social science major at the University of Washington (about two-thirds of the Law School's recent classes have been social science majors). In assessing the possible impact that unusually heavy time commitments to employment or extracurricular activities might have upon a candidate's apparent ranking, the Committee's base for comparison was the amount of time

typically expended by most qualified applicants in such activities. On all of these points, the Committee found no reason to adjust Mr. De Funis' apparent ranking because he seemed on each of them typical of applicants with reasonably comparable predicted first year averages.

The Committee specifically considered Mr. De Funis' graduate study and made no adjustment because of it. Many applicants who have been out of undergraduate school for some period report some quantum of part-time graduate study. The Committee seldom makes an adjustment in predicted first year average ranking for such work on several grounds: (1) such work, particularly in the early part of Masters' degree programs, tends to retrace upper division undergraduate work for the benefit of students new to the graduate school; (2) grades on such work tend to be confined to A's and B's rather than distributed over the broader range of undergraduate grades; and (3) where the work is part-time, we are uncertain as to the effective time demands on the student and thus can not easily compare the grades with those of a full-time student.

A final matter the Committee considered in connection with Mr. De Funis' application was possible adjustment of his LSAT score component in the predicted first year average formula because of his alleged illnesses on each of the first two takings of the test. The Committee receives from innumerable applicants statements as to why their LSAT score is not a fair measure of their abilities and many include statements alleging medical infirmities at the time of the test. The Committee has tended to discount most such statements, except for those demonstrating relatively severe symptoms fully verified by a physician, on the grounds that (1) while minor infirmities are likely to be spread throughout the entire group taking the LSAT test,

we are not likely to hear from high LSAT score applicants about such infirmities, and (2) we have no way to verify the degree of infirmity in most cases. On the basis of the evidence Mr. De Funis presented to the Committee, it did not adjust his LSAT score component.

Schedule A

To Accompany Defendants' Answers
to Interrogatories Propounded by Plaintiffs

I. Candidates Admitted to the Law School Class of 1974 as of August 1, 1971.

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.83	613	67.5	77.44			Yes
3.86	753	73	80.01			Yes
2.96	711	61	75.67			Yes
2.73	648.5	69.5	74.27			Yes
3.83	596	60	76.83	Yes		Yes
3.72	638	60	77.11			Yes
3.37	668	59	76.32			Yes
3.30	728	71	77.59			Yes
3.20	631	55	74.97			Yes
3.30	675	66	76.51			Yes
3.90	638	68	78.09			Yes
4.00	667	56	78.36	Yes		Yes
3.20	728	65	76.96			Yes
3.82	566	64	76.49			Yes
3.54	632	55	76.16			Yes
3.41	681	64	76.90			Yes
3.39	665	63	76.52			Yes
2.63	642	66	73.67			Yes
3.08	686	61	75.69			Yes
2.04	476	46	68.05		Yes	Yes
3.38	708	74	77.68	Yes		Yes
4.00	585	63	77.38			Yes
3.46	644	65	76.52			Yes
3.47	595	64	75.74	Yes		Yes
3.88	527	70	76.35			Yes
3.82	626	67	77.58			Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
2.98	619	63	74.37			Yes
3.34	570	57	74.57			Yes
3.25	663	64	76.05			Yes
3.17	747	64	77.12			Yes
3.78	610	56	76.69			Yes
3.41	747	47	77.17			Yes
2.72	525	56	71.65		Yes	Yes
3.34	501	60	73.62			Yes
3.13	734	62	76.68	Yes		Yes
3.51	708	67	77.82			Yes
3.28	638	68	75.94			Yes
4.00	577	59	77.06	Yes		Yes
3.62	613	69	76.78	Yes		Yes
3.86	501	60	75.47		Yes	Yes
3.45	645	63	76.42			Yes
3.74	644	67	77.60			Yes
3.03	736	71.5	76.79			Yes
3.88	572	70	77.06			Yes
3.13	381.5	37.5	69.96		Yes	Yes
3.36	662	68	76.61	Yes		Yes
3.29	625	72	75.95			Yes
3.43	707.5	61.5	77.27	Yes		Yes
3.98	610	64	77.75			Yes
3.78	700	66	78.58			Yes
3.49	646	66	76.70			Yes
3.86	662	66	78.24			Yes
3.35	606	63	75.45			Yes
3.00	512	46	71.97		Yes	Yes
3.46	656	64	76.67	Yes		Yes
3.00	427	34	70.08		Yes	Yes
3.32	699	68	77.05	Yes		Yes
3.33	625	58	75.45			Yes
3.08	523	45	72.37		Yes	Yes
3.17	682	60	75.90			Yes
3.58	662	64	77.19	Yes		Yes
3.59	674	64	77.42			Yes
3.95	694	63	78.93	Yes		Yes
3.75	717	63	78.60			Yes
3.61	669	69	77.64		Yes	Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.50	695	70	77.70			Yes
3.81	630	64	77.48			Yes
3.37	676	61	76.54			Yes
3.67	700	54	77.64			Yes
3.01	614	58	74.17			Yes
3.43	566	63	75.09			Yes
3.82	544	58.5	75.90			Yes
3.64	705	64	78.08			Yes
3.64	681	58	77.42			Yes
3.68	606	65	76.69	Yes		Yes
3.64	579	52	75.53			Yes
3.40	767	69	78.47			Yes
3.27	576.5	60.5	74.62	Yes		Yes
3.36	695	66	77.04	Yes		Yes
3.25	541	57	73.80			Yes
3.89	746	62	79.51			Yes
2.85	705	66	75.42			Yes
3.82	610	74	77.64			Yes
3.66	637	59	76.84	Yes		Yes
3.32	759	60	77.65			Yes
3.70	609	69	76.99			Yes
2.81	616	47	73.00	Yes		Yes
3.82	598	62	76.91			Yes
3.43	657	71	76.91			Yes
3.58	381	39	71.58		Yes	Yes
3.43	662	58	76.39			Yes
3.44	734	59	77.61	Yes		Yes
3.79	482	41	74.00		Yes	Yes
3.55	770	99	79.03			Yes
3.70	727	69	78.87			Yes
2.63	481	55	70.60	Yes	Yes	Yes
2.32	456	57	69.21		Yes	Yes
3.73	590	75	77.06			Yes
3.83	592	60	76.76			Yes
3.51	632	70	76.74			Yes
3.40	632	71	76.41	Yes	Yes	Yes
3.47	695	63	77.28	Yes		Yes
4.00	505	56	75.78			Yes
3.31	453	48	72.19		Yes	Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.18	660	62	75.67	Yes		Yes
3.76	695	56	77.97			Yes
2.90	517	48	71.79		Yes	Yes
3.53	573	68	75.78		Yes	Yes
2.06	539	52	69.40		Yes	Yes
3.67	676	71	78.04			Yes
3.16	759	60	77.09	Yes		Yes
2.37	475	24	67.71		Yes	Yes
3.70	650	60	77.24			Yes
3.71	626	71	77.38	Yes	Yes	Yes
4.00	637	71	78.57			Yes
3.41	724	66	77.67	Yes		Yes
3.75	608	70	77.19			Yes
2.82	319.5	37	67.87		Yes	Yes
na	667	54	na			Yes
3.46	585	62	75.45			Yes
3.91	571	58	76.61			Yes
3.40	699	67	77.29	Yes		Yes
2.75	717	67	75.32			Yes
3.67	681	55	77.39			Yes
3.21	671	59	75.81			Yes
3.32	602	50	74.69	Yes		Yes
2.96	527	55	72.48		Yes	Yes
3.92	611	62	77.46	Yes		Yes
3.61	682	62	77.52			Yes
3.57	735	60	78.14	Yes		Yes
3.45	742	73	78.42	Yes		Yes
3.90	662	61	78.16	Yes		Yes
3.95	711	73	79.66	Yes		Yes
3.76	638	68	77.61	Yes		Yes
3.77	694	62	78.26	Yes		Yes
3.75	608	66	77.01			Yes
3.60	637	68	77.04	Yes		Yes
3.78	620	70	77.49	Yes		Yes
3.75	646	60	77.34			Yes
3.73	604	67	76.92			Yes
3.67	625	74	77.36			Yes
3.83	644	68	77.95	Yes		Yes
3.86	651	62	77.89	Yes		Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.80	729	71	79.34	Yes		Yes
2.66	588	62	72.72			Yes
3.86	661	65	78.18	Yes		Yes
2.68	672	74	74.66	Yes		Yes
3.59	735	63	78.34			Yes
3.47	758	66	78.42	Yes		Yes
3.60	708	62	77.90			Yes
3.75	684	49	77.44	Yes		Yes
3.22	427	41.5	71.19	Yes	Yes	Yes
3.29	734	65	77.36	Yes		Yes
3.71	645	61	77.23	Yes		Yes
3.67	670	64	77.62	Yes	Yes	Yes
3.57	742	71	78.75	Yes	Yes	Yes
3.94	687	58	78.55			Yes
3.36	651	76	76.80	Yes		Yes
3.85	608	59	77.05	Yes		Yes
3.62	715	64	78.17			Yes
na	734	73	na	Yes		Yes
3.93	717	58	79.00	Yes		Yes
3.50	705	56	77.22	Yes		Yes
3.65	674	63	77.57	Yes		Yes
3.72	760	64	79.23	Yes		Yes
2.92	622.5	76	74.82	Yes	Yes	Yes
3.12	426	27	70.14		Yes	Yes
3.60	632	64	76.78	Yes		Yes
3.68	584	67	76.44	Yes		Yes
3.09	746	74	77.27	Yes		Yes
4.00	663	68	78.84			Yes
3.60	663	68	77.45			Yes
3.44	753	71	78.46	Yes		Yes
3.43	720	59	77.35	Yes		Yes
2.89	663	58	74.52	Yes	Yes	Yes
3.70	631	76	77.66	Yes		Yes
3.07	741	71	76.99	Yes		Yes
3.62	668	80	78.15	Yes		Yes
3.44	660	60	76.48			Yes
3.90	671	72.5	78.85			Yes
3.33	650	70	76.40			Yes
3.84	687	76	79.03			Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.83	562	71	76.79	Yes		Yes
3.75	612	59	76.75	Yes		Yes
3.42	701	74	77.60			Yes
3.62	637	65	76.97	Yes		Yes
3.71	624.5	68.5	77.28	Yes		Yes
3.95	608	66	77.71	Yes		Yes
3.54	688	71	77.78	Yes		Yes
4.00	730	74	80.18			Yes
3.36	735	62	77.50	Yes		Yes
3.68	611	71	77.04	Yes		Yes
3.21	695	61	76.29	Yes		Yes
3.45	590	44	74.68		Yes	Yes
3.38	753	62	77.85	Yes		Yes
3.66	662	58	77.19			Yes
3.73	721	55	78.23			Yes
3.91	657	64	78.26	Yes		Yes
3.79	620	58	76.97	Yes		Yes
3.40	594	68	75.66	Yes		Yes
3.21	735	68	77.24	Yes		Yes
3.60	644	64	76.97	Yes		Yes
2.67	469	48	70.23		Yes	Yes
3.63	683	66	77.78	Yes		Yes
3.86	688	63	78.52			Yes
3.39	432	41	71.82		Yes	Yes
3.77	605.5	67	77.09	Yes		Yes
3.71	687	62	77.94	Yes		Yes
3.47	693	68	77.47	Yes		Yes
3.85	636	62	77.62			Yes
4.00	800	71	81.16	Yes		Yes
3.64	630	67	77.03	Yes		Yes
3.23	783	72	78.25			Yes
3.76	637	58	77.14			Yes
3.83	608	56	76.83			Yes
3.44	711	62	77.38			Yes
2.53	618	61	72.70	Yes	Yes	Yes
3.71	657	54	77.56	Yes		Yes
3.60	662	63	77.21	Yes		Yes
3.75	615.5	64.5	77.06			Yes
3.59	687	68	77.80	Yes		Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
2.37	611	50	71.53	Yes	Yes	Yes
3.28	638	62	75.67	Yes	Yes	Yes
3.85	699	64	78.71			Yes
3.11	583	48	73.57	Yes	Yes	Yes
4.00	709	74	79.84	Yes		Yes
3.96	728	72	79.92	Yes		Yes
2.11	603	55	70.73	Yes	Yes	Yes
3.68	720	57	78.14	Yes		Yes
3.75	645	55	77.10			Yes
3.69	657	65	77.53			Yes
3.88	644	62	77.85			Yes
3.28	541	52	73.67		Yes	Yes
3.83	614	63	77.24	Yes		Yes
3.69	650	62	77.29			Yes
3.14	791	73	78.12	Yes		Yes
3.23	683	63	76.25	Yes		Yes
3.43	435.5	38	71.87	Yes	Yes	Yes
3.33	765	68	78.13	Yes		Yes
3.48	637	67.5	76.72	Yes		Yes
3.23	681	67	76.41	Yes		Yes
3.54	576	62	75.59	Yes		Yes
3.62	625	66	76.83	Yes		Yes
3.82	643	49	76.98			Yes
3.48	624	66	76.56	Yes		Yes
3.77	665.5	67.5	78.09	Yes		Yes
3.80	649	71	78.07	Yes		Yes
3.47	693	63	77.25	Yes		Yes
2.69	689	49	73.84	Yes	Yes	Yes
3.76	715	74	79.11	Yes		Yes
3.87	620	75	78.03	Yes		Yes
3.24	729	71	77.39	Yes		Yes
3.76	687	68	78.39			Yes
3.49	693	66	77.46	Yes		Yes
3.33	737	68	77.69			Yes
3.10	689	75	76.45	Yes		Yes
3.92	699	67	79.09			Yes
3.40	687	71	77.28	Yes		Yes
3.84	620	65	77.46			Yes
3.82	630	67	77.65	Yes		Yes

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.84	663	72	78.46			Yes
3.81	707	60	78.52			Yes
2.29	529	60	70.41		Yes	Yes
3.89	683	68	78.78			Yes
3.52	521	60	74.55		Yes	Yes
3.37	701	68	77.26	Yes		Yes
3.47	544	54	74.48	Yes		Yes
3.64	702	71	78.35	Yes		Yes
3.64	650	52	76.66	Yes		Yes
3.36	701	59	76.82			Yes
3.91	584	62	77.01	Yes	Yes	Yes
3.89	674	58	78.18	Yes		Yes

II. Candidates Admitted to the Law School Class of 1974 as of August 31, 1971, who were not on the Waiting List as of August 1, 1971.

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.21	392	28	69.97	Yes	Yes	Yes
2.30	385	38	67.14	Yes	Yes	Yes
2.12	437	40.5	67.49		Yes	Yes

III. Candidates on the Waiting List for the Law School Class of 1974 as of August 1, 1971.

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.25	722	68	77.18			
3.16	717	64	76.60	Yes		
3.69	546.5	51	75.14			
3.62	668	60	77.24			
3.40	620	74	76.36	Yes		
3.34	687	55	76.34	Yes		
3.63	638	58	76.69			
3.45	657	65	76.70			
3.96	572	60	76.89			

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.25	604	67	75.25	Yes		
3.80	626	68	77.56	Yes		
3.41	636	64	76.18			
3.33	637	64	75.92			
3.72	629	49	76.46			
3.33	637	60	75.74			
3.77	613	62	77.00	Yes		
3.48	644	59	76.32			
2.98	662	59	74.88	Yes		
3.90	599	46	76.47			
3.36	626	66	75.96	Yes		
3.34	657.5	76.5	76.85	Yes		
3.20	681	67	76.31			
3.56	625	64	76.53			
3.17	708	69	76.72	Yes		
3.09	711	60	76.08			
3.42	632	62	76.06	Yes		
3.02	727	60	76.09	Yes		
2.95	741	70	76.52	Yes		
3.43	585.5	59	75.22			
3.61	602	58	76.06			
2.51	746	65	74.84	Yes		
3.11	699	71	76.46	Yes		
3.61	707	61	77.87			
3.06	669	63	75.43	Yes		
3.66	604	58	76.26			
3.55	610	62	76.17			
3.70	592	60.5	76.33			
3.42	626	70	76.32			
3.67	632	55	76.61	Yes		
3.93	535	52	75.84			
3.31	679	56	76.15			
3.64	612	58	76.33	Yes		
3.11	688	67	76.11			
3.58	626	59	76.38	Yes		
3.39	662	55	76.37	Yes		
3.38	687	59	76.66			
3.87	560	65	76.61			
3.54	623	64.5	76.45	Yes		

(a) Combined Jr.-Sr. GPA	(b) LSAT Figure	(c) Writing Figure	(d) Predicted First Year Average	(e) Non-Resident	(f) Minority Group Member	(g) Admitted As of August 30, 1971
3.84	595.5	58.5	76.81			
3.60	626	62	76.59			
3.71	637	58	76.96			
3.93	523	63	76.15			
3.72	650	51	76.91	Yes		
3.55	625	61	76.36	Yes		
3.64	650	52	76.66			

F. FINDINGS OF FACT AND CONCLUSIONS OF LAW (R. 8)

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

(Title Omitted)

I.

That the plaintiffs Marco DeFunis, Sr. and Betty DeFunis, his wife, are husband and wife, parents of the plaintiff Marco DeFunis, Jr., and are taxpayers and are and have been residents of Seattle, King County, Washington, for approximately fifty years.

II.

That the plaintiffs Marco DeFunis, Jr. and Lucia DeFunis, his wife, are husband and wife, were born in Seattle, and are taxpayers and are and have been residents of King County, Washington, for more than 22 years and are now residents of the city of Bellevue, Washington.

III.

That the plaintiff Marco DeFunis, Jr. is 22 years of age, a graduate of the public elementary schools and of Franklin High School in Seattle, Washington, and was graduated from the University of Washington in June, 1970, with a Bachelor of Arts degree.

IV.

That the plaintiff Marco DeFunis, Jr. graduated from the University of Washington with an overall grade average of 3.62 out of a possible 4.00; a junior-senior year grade point average of 3.71, as calculated by the law school, or 3.8 when you include 9 hours of straight A he received in latin during the first quarter of his junior year in the summer of 1968.

V.

That the plaintiff Marco DeFunis, Jr. was graduated from the University of Washington in June, 1970, Phi Beta Kappa and magna cum laude.

VI.

That Marco DeFunis, Jr. worked part time 20 to 40 hours per week during the school year and at the same time taught Sunday school on weekends.

VII.

The defendants are the University of Washington, an agency of the state of Washington, and the defendant Charles Odegaard is president of the University of Washington. The defendants Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert I. Tennaugh, Jack G. Newpert, Robert F. Philip and George V. Powell, comprise all of the regents of the University of Washington.

VIII.

That Richard S. L. Roddis is the Dean of the University of Washington School of Law. Richard O. Kummert, Robert S. Hunt, William R. Anderson, Robert L. Fletcher, Geoffrey L. Crooks and Virginia Lyness are professors of law and members of the Admissions Committee of the

University of Washington School of Law. Rochelle Kleinberg, at the times material hereto, was a second year law student, and that Tama Zorn and Vincent Hayes, at the times material hereto, were first year law students, and all three were members of the Admission Committee of the University of Washington School of Law.

IX.

The Board of Regents of the University of Washington has delegated through the president to the faculty of the School of Law the power to determine the processes and policies governing admission to the School of Law. Pursuant to this delegation of authority, the faculty has designated an Admissions Committee to determine who shall be admitted to the School of Law. During all times pertinent hereto the Admissions Committee was composed of five faculty members and two students. Faculty members are selected by the Dean and the Committee on Committees, the latter committee being elected by the full faculty. Student members are selected by the Student Bar Association, which is comprised of all the enrolled students in the School of Law.

X.

The University of Washington School of Law received 1601 completed applications for admission to the class beginning September, 1971. Under the University's enrollment limitation there were 445 positions allotted to the School of Law, and of these the number available for the first year class was between 145 and 150 students. Each applicant had earned a baccalaureate degree, had taken the Law School Admission Test, and had completed the application process which included procuring letters of

recommendation from a college faculty member and a college dean, as well as, at his option, submitting a personal statement identifying elements in his background and experience that he felt were relevant in considering his application.

XI.

That the plaintiff Marco DeFunis, Jr. applied for admission to the University of Washington School of Law class of 1973, commencing in the fall of 1970, after graduating from the University of Washington in the spring of 1970. He was not accepted, but was placed on the class admissions waiting list and after waiting until late summer of 1970 was finally denied admission to the Law School for the fall term beginning 1970. At that time said plaintiff was advised he might have a better chance of attending Law School with the class entering in the fall of 1971.

XII.

Thereafter, during the academic year 1970-71, the plaintiff Marco DeFunis, Jr. attended graduate school and took 24 hours of graduate school courses, in which, at the time of his application, he had received 21 hours of A and 3 hours of incomplete, while working 36 or more hours per week for the Seattle Park Department.

XIII.

That the plaintiff, Marco DeFunis, Jr., for a second time applied to the University of Washington School of Law for admission in the fall of 1971. Said plaintiff's admissions creditials included, in addition to the high scholastic records achieved as an undergraduate, and his one-year graduate school record as set forth above, Law School Aptitude Test scores of 512 (August, 1969), 566 (Novem-

ber, 1969), and 668 (December, 1970). The score of 668 is within the top 7% of all law school applicants in the nation who have taken the test in the last three years.

XIV.

That the plaintiff Marco DeFunis, Jr. had a Predicted First Year Average, as determined by the Law School for comparison with other candidates of 76.23 and that said plaintiff's Predicted First Year Average was calculated by using a formula combining the said plaintiff's junior-senior year grade point average of 3.71 average L.S.A.T. score of 582 (512 + 566 + 668, divided by three) and average writing test score component of 61 (62 + 58 + 64 divided by three).

XV.

The plaintiff Marco DeFunis, Jr. was for a second time not accepted to the University of Washington Law School, but was placed on the class admission waiting list. He was notified of his final denial of Admission on August 2, 1971.

XVI.

The ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of P.F.Y.A.'s. There were 29 applicants who had higher P.F.Y.A.'s than plaintiff's and whose applications were denied; there were 74 applicants (including 36 minority group applicants) who had lower P.F.Y.A.'s than plaintiff's and whose applications were granted. The actual number of said minority group students, excluding Asian-Americans, enrolling in the class was 18.

XVII.

The Admissions Committee sent letters of acceptance to over 200 applicants. Normal attrition among those in-

vited to attend would have reduced this group to produce a class of about 150. Against the possibility of unusually high attrition among the group of selected applicants, the Committee placed approximately 155 additional applicants on a waiting list. That list was ranked in quartiles, there being approximately 46 applicants in the first or highest quartile, 38 applicants in the second quartile, 36 applicants in the third quartile, and 33 applicants in the fourth, or lowest, quartile. The remaining applicants—those receiving neither offers of acceptance nor waiting list assignments—received letters of denial. Plaintiff received an invitation to be placed on the waiting list and he was ranked in the fourth or lowest quartile. On July 21, 1971, the rate of attrition from the admitted applicants appearing to be within normal ranges, the Committee decided to send letters of denial to those applicants in the third and fourth quartiles on the waiting list. Plaintiff was thus notified on August 2, 1971, that he would not be admitted to the School of Law class beginning September, 1971.

XVIII.

As of August 1, 1971, 275 students were finally admitted to the freshman Law School class and 55 students remained on the waiting list, making a total of 330 students. The plaintiff Marco DeFunis, Jr. was notified at that time that he was neither admitted nor any longer on the waiting list.

XIX.

Out of the 275 students admitted to the Law School, 127 were nonresidents of the state of Washington. Out of the total considered 330 students, 150 were nonresidents of the state of Washington and 180 were residents of the

state of Washington. Thirty-two non-residents or 21.6% of the entering class were enrolled in the first year law class.

XX.

Out of the 275 students admitted to Law School, 180 had a lower junior-senior year grade point average than the plaintiff Marco DeFunis, Jr., and 95 had a higher junior-senior year grade point average. Of the total 330 students considered, 224 had a lower junior-senior year grade point average than plaintiff Marco DeFunis, Jr., and 106 of the 300 had a better junior-senior year grade point average. (Using the Law Schools' calculation of the plaintiff Marco DeFunis, Jr.'s junior-senior year grade point average, and not including nine hours of A earned in his junior year.)

XXI.

That the total number of students admitted to the University of Washington School of Law, 44 of these students were "minority" students, i.e., who were Afro-American, Asian-American, Chicano or American-Indian. Of the total of these "minority" students admitted, 6 had qualifications higher than the plaintiff and 38 had qualifications lower than the plaintiff Marco DeFunis, Jr. (Based on the Law School's calculations.)

XXII.

That the Law School desired to achieve a greater "minority" representation among students enrolled therein. To accomplish this desire the Law School gave a preference to some races, including Afro-Americans, Chicanos and American-Indians. In doing so, the Admissions Committee assumed that all members of minority races, with the ex-

ception of Asian-Americans, were deprived persons. The applications of black students were separated from all others and assigned for review to a black student and a professor who worked closely with the CLEO program. The applications of other minority students, except Asian-Americans, were assigned to Professor Hunt. The CLEO program is set up specifically to aid minority and other culturally deprived students both financially and educationally in their admission to law schools and is supervised by law schools.

XXIII.

That some minority students were admitted to the University of Washington School of Law prior to and instead of the plaintiff Marco DeFunis, Jr., with college grades and aptitude test scores so low that had they been white their applications would have been summarily denied.

XXIV.

That since no more than 150 applicants were to be admitted to the University of Washington School of Law, the admission of less qualified students resulted in a denial of places to those better qualified.

XXV.

That the plaintiff Marco DeFunis, Jr. had better qualifications than many of the students admitted by the Law School Admissions Committee and the plaintiff Marco DeFunis, Jr. was and is fully qualified and capable of attending the University of Washington School of Law satisfactorily.

XXVI.

That there were some students who were admitted in previous years and then went into the Armed Services of

the United States, which students were admitted without further examination of credentials, although some of these credentials were lower than the plaintiff's.

XXVII.

That there is at least one place held for the plaintiff Marco DeFunis, Jr. under a temporary restraining order dated August 31, 1971, which order restrained the University of Washington from "admitting applicant students or transfer students to undergraduate law study in the law school of the University of Washington in a number which would preclude the admission of plaintiff, Marco DeFunis, Jr., to the 1971-72 first year class," . . . and said plaintiff has been and is now attending said Law School, subject to the final determination of his case herein.

From the foregoing Findings of Fact, the court now makes the following

CONCLUSIONS OF LAW

I.

That in denying the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law, the University of Washington has discriminated against said plaintiff and has not accorded to him equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

II.

That there is no constitutional restriction upon admitting nonresidential students and no laws or regulations providing that preference shall be given to residential students over nonresidential students for admission to the University of Washington School of Law.

III.

That the plaintiff Marco DeFunis, Jr. should be admitted to the University of Washington School of Law for the class of 1974, beginning September 22, 1971, and that the defendants are ordered and directed to admit said plaintiff Marco DeFunis Jr. into the University of Washington School of Law.

IV.

That the defendants wrongfully denied the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law.

V.

That the plaintiffs shall recover their costs and disbursements herein to be taxed.

Done in open court Oct. 18th, 1971.

LLOYD SHORETT

Judge

G. ORAL DECISION OF WASHINGTON SUPERIOR COURT FOR KING COUNTY (R. 538)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

(Title Omitted)

Before: The Honorable LLOYD SHORETT, Judge.

September 22, 1971
10:00 o'clock a.m.

APPEARANCES:

For the Plaintiffs: JOSEPH DIAMOND, ESQ. and CRAIG S. STERNBERG;

For the Defendants: JAMES B. WILSON, ESQ.

THE COURT: Counsel, we all know that this case is of

a type that will, and indeed should be, reviewed very quickly by the Supreme Court of the State and so I will just state my views and that Court will get a chance then to review what I have said and eventually decide the matter.

It seems to me that the law school here wished to achieve greater minority representation and in accomplishing this gave preference to the members of some races. In doing this the Admissions Committee assumed that all members of minority races, with the exception of Asians, were deprived persons. The applications of the black students were separated from all others and assigned for review to a black student and a professor who had worked closely with the CLEO program.

Some minority students were admitted whose college grades and aptitude test scores were so low that had they been whites their applications would have been summarily denied. Excluding the Asians only one minority student out of 31 admitted among the applicants had a predicted first year average above the plaintiff's.

Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group, have not in my opinion, been accorded the equal protection of the law guaranteed by the Fourteenth Amendment.

In 1954 the United States Supreme Court in *Brown v. The Board of Education* decided that public education must be equally available to all regardless of race.

After that decision the Fourteenth Amendment could no longer be stretched to accommodate the needs of any

race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.

The other claims made by the plaintiff are, in my opinion, without merit.

Article Nine of our State Constitution requiring the State "To make ample provision for the education of all children residing within its borders . . ." obviously does not apply to graduate schools, *Litchman v. Shannon*, 90 Wn. 186.

There is no constitutional restriction upon admitting non-resident students. The record shows that 21.6 per cent of the entering class are non-residents. This is down from 30.9 per cent last year and perhaps due to the increase in non-residents fees. In the absence of a statutory provision or a University rule the Court cannot interfere with this determination regarding the admission of non-residents.

It should be recognized that many Washington students attend law schools in other states thus equalizing the load between the states. Students who were admitted in previous years and then drafted into the Armed Services were also admitted without further examination of credentials. This was no distinction based upon race and such regulation, it seems to me, is quite proper.

Some difficulty is encountered in determining the proper remedy to correct the discrimination. Only the plaintiff has brought an action. The other eligible applicants have not commenced timely suits against the University. I think in law they must be said to have rested on their rights and the principle of laches should prevent suits by them during

this ensuing academic year which suits would interfere greatly with the conduct of the law school.

Since the plaintiff has brought this action and has very acceptable credentials and since I find that there has been discrimination here involving 30 or so students admitted upon an entirely different system than that applied to this plaintiff, I think there should be a remedy for the wrong and the plaintiff will be admitted to the law school. The defendants are directed to allow him admission to the school in this year's class.

Gentlemen, I think that disposes of the issues. Are there any questions?

MR. DIAMOND: None, your Honor. Thank you.
MR. WILSON: None, your Honor.
THE COURT: We will be in recess.

(Whereupon, at 10:10 a.m. the Court recessed.)

H. JUDGMENT OF THE SUPERIOR COURT FOR KING COUNTY (R. 6)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR., and LUCIA DE FUNIS, his wife,

Plaintiffs,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT, and RICHARD L. RODDIS, Admissions Committee of University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE V. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Defendants.

No. 741727

JUDGMENT

THIS MATTER having come on regularly for hearing before the Honorable Lloyd Shorett, judge of the Superior Court of King County, sitting without a jury, the plaintiffs being represented by Josef Diamond and Craig S. Sternberg of Lycette, Diamond & Sylvester, and the defendants being represented by Slade Gorton, Attorney General, and James B. Wilson and John Lackland, Assistant Attorneys General for the State of Washington, and the court having heard the testimony of witnesses, having fully considered all of the evidence and records and files herein,

and having made and entered its Findings of Fact and Conclusions of Law, it is now, Therefore,

ORDERED, ADJUDGED AND DECREED that the defendants are directed to allow the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law, class of 1974, as of September 22, 1971, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs be and hereby are entitled to recover their costs and taxable disbursements herein.

DATED this 18th day of October, 1971.

LLOYD SHORETT, Judge

I. DECISION OF WASHINGTON SUPREME COURT (R. 586)

The decision of the Supreme Court of Washington (*DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169) is printed as Appendix A, beginning at page A-1 of Petitioner's Jurisdictional Statement or in the Alternative Petition for Certiorari.

J. WASHINGTON SUPREME COURT ORDER DENYING PETITION FOR REHEARING (R. 664)

The order of the Supreme Court of Washington denying petitioner's petition for rehearing is printed as Appendix E, at page A-71, of Petitioner's Jurisdictional Statement or in the alternative Petition for Certiorari.

K. REMITTITUR OF WASHINGTON SUPREME COURT (R. 665)

IN THE SUPREME COURT OF WASHINGTON
(Title Omitted)

The State of Washington to: The Suprior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 8, 1973, became the final judgment of this court in the above entitled case on May 16, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows: Two thousand three hundred and two and 72/100 dollars ($2,302.72) in favor of appellants and against respondents.

The petition for rehearing was denied by order dated May 16, 1973.

cc: Honorable Slade Gorton
Mr. James B. Wilson
Lycette, Diamond & Sylvester
Mr. Josef Diamond
Mr. Lyle L. Iversen
Mr. Craig S. Sternberg
Report of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 16th day of May, A.D. 1973.

/s/ WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

..... Term, 1973

No. 73-235

MARCO DE FUNIS and BETTY DE FUNIS, his wife;
MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,
Plaintiffs-Appellants,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,
Defendants-Respondents.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

..... Term, 1973

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OPINION BELOW

This appeal is from the judgment of the Supreme Court of the State of Washington, entered March 8, 1973, by a divided court reversing the judgment of the Hon. Lloyd Shorrett, judge of superior court of the state of Washington for King County. Petition for rehearing was denied by the Supreme Court of Washington on May 16, 1973.

The opinion of the Washington Supreme Court is reported under the title *Marco DeFunis, et al. vs. Charles Odegaard, President of the University of Washington, et al.*, in 82 Wn.2d 11, 507 P.2d 1169. The opinion is set out in Appendix A herein. The opinion of the trial court is set out as Appendix G hereto.

The judgment of the Superior Court, which was reversed, is set out herein as Appendix B; the findings of fact and conclusions of law of the Superior Court are Appendix C.

Notice of appeal to this Court was filed with the Washington Supreme Court on or about the 24th day of May, 1973.

GROUNDS FOR INVOKING JURISDICTION

This is a civil action drawing into question the validity of a rule or policy adopted by the Board of Regents of the University of Washington, a state institution the recipient of federal assistance, whereby preference is given on the basis of *race alone* to members of certain so called minorities in the competition for limited openings for admission to the law school, to the exclusion of better qualified general students. The rule was challenged as depriving student applicants to the law school of the equal protection of the laws, in violation of Section 1 of Amendment XIV of the United States Constitution, and as being in violation of Section 2000(d), Title 42, United States Code, which provides:

> "No person in the United States shall, on the ground of *race*, color or national origin, *be excluded from participation in*, be denied the benefits of, or *be subject to discrimination* under any program or activity receiving federal financial assistance." (Emphasis ours)

Plaintiff-appellant is a white student who was deprived of his civil rights by being excluded from entry to the law school by invoking the aforementioned policy.

This appeal is taken pursuant to Title 28 United States Code, Section 1257(2). The State Supreme Court reversed the trial court and sustained the questioned policy and by state action has denied plaintiff-appellant DeFunis the equal protection of the laws because he is white.

The rule or policy referred to being official action of an agency of the state of Washington is equivalent to a statue of the state of Washington. *Hamilton v. Regents of the University of California*, 293 U.S. 245, 79 L. Ed. 343; *Sultan Railway and Timber Co. v. Department of Labor and Industries of the State of Washington*, 277 U.S. 135, 72 L. Ed. 820; *Lake Erie Railroad v. Public Utilities Commission*, 249 U.S. 422, 63 L. Ed. 684.

If it is determined that this is not a proper case for *appeal*, it is requested that this jurisdictional statement be treated as a *petition for certiorari*, pursuant to 28 U.S.C. 2103.

The date of the judgment sought to be reviewed and the date of entry is March 8, 1973. The matter has been remitted to the Superior Court for further proceedings in accordance with the opinion of the State Supreme Court. A copy of the remittitur is Appendix D hereto. A copy of the order denying rehearing is set out herein as Appendix E. The date the notice of appeal was filed with the Supreme Court of Washington was May 24, 1973. A copy of the notice of appeal is set out herein as Appendix F.

THIS IS A MATTER OF FIRST IMPRESSION IN THIS COURT

This Court has not heretofore passed upon the question of whether a person who is not of a minority race may be disadvantaged by preference given by official action to others on the basis of race alone. The divided opinion of the Washington Supreme Court expressly holds that race may be the basis for denying benefits to a non-minority person, the court saying in its opinion, on page 21, Appendix A, herein:

> ". . . A denial of a benefit on the basis of race is not necessarily a per se violation of the Fourteenth Amendment if the racial classification is used in a compensatory way to promote integration."

The court went on to say:

> "We conclude that the consideration of race as a factor in the admissions policy of the state law school is not a per se violation of the equal protection clause of the Fourteenth Amendment."

The decision of the Washington Supreme Court permitted plaintiff-appellant to be crowded out of a space in the law school by minority students of which the trial court made the following finding:

> "Some minority students were admitted to the University law school prior to and instead of plaintiff Marco DeFunis, Jr., with college grades and aptitude test scores so low that had they been white their applications would have been summarily denied." (Findings, ¶23, Appendix C herein).

This is contrary to the way federal courts have decided comparable questions. This court, in *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142 (1970), said:

> "Few principles of law are more firmly stitched into our constitutional fabric than the proposition that *a*

state cannot discriminate against a person because of his race or the race of his companions. . . ." (Emphasis supplied)

The decisions of this Court have made equality the touchstone of the cases construing the Fourteenth Amendment. This Court in *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 38 ALR2d 1180, under footnote 5, quotes the following from *Struder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664:

> "It ordains that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but the declaring that the law in the state shall be the same for the black and for the white; that *all persons, whether colored or white, shall stand equal before the laws of the states . . .*" (Emphasis supplied).

Treatment of nonminority white students on a less favorable basis than is accorded by the state institution to minority (black) students, is a clear denial of the equality which is necessary to meet the test of the constitutional requirement of equal protection of the laws.

One of the guidelines for determining when certiorari will be granted according to Rule 19 of this Court, is that a state court has decided a federal question of substance not theretofore determined by this Court, or decided it in a way probably not in accord with applicable decisions of this Court. *Both of these criteria are met in this case.*

The policy of the university which was sustained by the decision of the Washington Supreme Court is stated in the testimony of the president of the university (St. 245):

"Q. I am not asking about those things, I am asking you

if the new policy with reference to minorities that you say you have approved, and the regents have either approved or adopted, whether that policy permits the law school admissions to admit minority students with lower grades and qualifications than other students.

"A. I think it does."

The foregoing policy adopted by the regents of the university was sustained by the Washington Supreme Court, and we submit brings this case within the class of cases that may be appealed to this Court under Rule 10.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction the equal protection of the laws or the deprivation of life, liberty or property without due process of law is violated by an order of the governing authorities of the University of Washington, a state institution, giving preference *solely on the basis of race* to certain persons to the exclusion of others in competition for limited spaces available in the law school.

B. Whether a rule of the University of Washington whereby white students are required, *solely on the basis of race*, to meet different and more stringent criteria than are persons of certain other races in obtaining admission to the law school, violates the federal Civil Rights Act, Title 42, U.S.C. §2000(d), which prohibits discrimination or exclusion on the basis of race from any program or activity receiving federal financial assistance.

STATEMENT OF THE CASE

Plaintiff Marco DeFunis, Jr. (herein referred to as though he were sole plaintiff) was denied admission to the University of Washington Law School in August of 1971 for the second time in successive years (Findings of Fact ¶XV, Tr. 11) although he had an outstanding academic record, having graduated from the University of Washington on June 19, 1970 Phi Beta Kappa, and *magna cum laude* (Findings, ¶V, Tr. 8) with an overall grade average of 3.62 out of a possible 4.00, and a junior-senior year grade point average of 3.71, *as calculated by the law school*, or 3.8 if 9 hours of straight A in Latin omitted from the law school calculations are considered (Findings, ¶IV, Tr. 8).

The University of Washington Law School received 1,601 applications for admission to the class beginning September, 1971. Under the university's enrollment limitations, there were 445 openings allotted to the school of law, and of these the number available for the first year class was between 145 and 150 students (Findings ¶X, Tr. 9).

In determining who should be admitted and who should be excluded, a law-school admissions committee applied a university-wide policy adopted by the Board of Regents, whereby members of certain so-called minority races were treated separately from and more favorably than, general students and were not directly compared to applicants outside the minority group, but were compared only to each other. The admissions committee admitted to the law-school applicants within the minority category who according to the *undisturbed findings of the trial court*, had

college grades and aptitude test scores were so low that *had they been white their applications would have been summarily denied* (Appendix C, ¶XXIII).

Of the total number of students *invited* to enter the first year law class, *44* were *minority* students. Of the total of these minority students, *only 6 had qualifications higher than the plaintiff, and 38 had qualifications lower* than the plaintiff. The trial court found

> "That since only 150 applicants were to be admitted to the University of Washington Law School *the admissions of the less qualified students resulted in a denial of places to those better qualified.*" (Findings, ¶XXIV, Tr. 13, Emphasis ours)

As a prerequisite to admission, each applicant must have earned a baccalaureate degree and must have taken the law school admission test (LSAT) (Findings ¶X, Tr. 9). The University had set up a Law School Admissions Committee through subdelegation from the Board of Regents, consisting of five faculty members and two law students (Findings ¶IX, Tr. 9, Statement 330).

Applicants' records were subjected to a formula whereby the Law School Admissions test scores for each applicant were combined with Junior-Senior average grades to establish a preliminary index called a "Predicted First Year Average" (PFYA) (Findings, ¶XIV, Tr. 11, Ex. 45, St. 360, St. 56, Ans. to Interrogatories, p. 3; St. 181, 357). Students making a PFYA average above 77 were almost automatically admitted to the Law School (St. 340).

Those whose PFYA scores were below 74.5 were almost all rejected *unless they were members of what were determined to be the minority groups* (St. 341).

Marco DeFunis, Jr. had a PFYA score of 76.23 (Findings ¶XIV, Tr. 11), under the University's calculations which omitted consideration of nine hours of A, and a score of 76.56 if the nine hours were considered (St. 385). And considerably higher than that if the correct LSAT average was used (St. 387, 388).

The material available to the committee for the judgment of the students consisted of a law school admission test score (LSAT), a copy of transcripts of all schools and colleges attended, certain letters of recommendation, and the students' own statements (St. 338). There were *no personal interviews* by the Admissions Committee (St. 22). The committee had *no way of knowing* from the files or otherwise *whether the applicants were affluent or poor* (St. 262), but *all* students who were Blacks, American Indians, Chicanos or Asian-Americans were classified as "minority students" and assumed to be deprived persons *without any further inquiry* (Findings, ¶XXI, XXII, Tr. 13, St. 351), and even though all such "minority" students were college graduates. No test was made as to whether such persons were in fact "deprived persons."

No special privileges were given to Asian-Americans, since a "sufficient" number of them could be passed on the same basis as *non* minority students (St. 352).

The files of the other "minority students" were divided into two piles and all those who were Black were first reviewed by a Black first year law student member of the Admissions Committee and Professor Geoffrey Crooks, who had been director of the schools' Black CLEO program (Findings ¶XXII, Tr. 13, St. 352). The remainder of the "minority" files, covering essentially Chicanos, American-

Indians and Philippine-Americans, were reviewed specially by Dean Hunt (St. 352).

Approximately 1,000 applicant files were never reviewed by the Committee at all (St. 316). Each member of the Committee reviewed approximately 70 files (St. 353). The recommendations of the individual committee members then went to the full committee, who voted on acceptance of the recommendations (St. 255). *All* of the *minority* applicants who were recommended *were given invitations to enter* the first year law class.

The Admissions Committee sent letters of acceptance to 275 students as of August 1, 1971, assuming a normal attrition among those invited to attend would reduce the group to produce a class of about 150 (Findings ¶XVII, Tr. 11). Against the possibility of unusually high attrition among the group of selected applicants, the Committee placed approximately *155* applicants on a waiting list. Plaintiff was on this waiting list but he was advised of non-acceptance on August 2, 1971 (Findings ¶XVII, Tr. 11). *The number of acceptances was increased to 311 by September 15, 1972 (St. 367) but did not include the plaintiff.*

The University of Washington receives various kinds of federal support, included federally funded CLEO program, mentioned on page 10 of the opinion of the Washington Supreme Court and the Upward Bound program described in the testimony (St. 228).

The federal questions were raised in the state courts and the decision of the trial court was based largely upon the finding that the rule of the University in treating general students less favorably than so called minority students violated the equal protection clause of the Fourteenth

Amendment to the federal constitution. The trial court's first conclusion of law was:

> "That in denying the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law, the University of Washington has discriminated against said plaintiff and has not accorded to him equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution."

The issue of violation of the Fourteenth Amendment to the United States Constitution was argued extensively in respondent's brief to the Washington Supreme Court. The section of the brief designated II (a) was devoted almost exclusively to the argument of this issue, under the heading "Special Privileges and Immunities Accorded to Some Students Denied Plaintiff the Equal Protection of the Law."

The issue of the violation of 42 U.S.C. §2000(d), providing that no person shall, on the ground of race, color or national origin, be excluded from participation in, be denied benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance was extensively argued to the Washington Supreme Court in plaintiff's brief under section IIB, page 14 thereof, and was directly raised in the state court. The Supreme Court of Washington directly decided the issue of the violation of the equal protection clause of the Fourteenth Amendment in its opinion, saying, on page 33:

> "We hold that the minority admissions policy of the Law School and the denial by the Law School of admission to plaintiff, violated neither the equal protection clause of the Fourteenth Amendment to the United States Constitution, nor Article I, Section 12 of the Washington state constitution."

The opinion of the Washington Supreme Court did not specifically mention the prohibition against the exclusion on the basis of race contained in Title 42 U.S.C. §2000(d).

The trial court ordered the University to admit Marco DeFunis, Jr. to the law school and that order is still in effect.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This case involves some of the most fundamental rights of citizens under the federal Constitution, notably the right to equal treatment.

If there is a principle that under the Constitution members of the majority race may be denied equal treatment for the benefit of members of minority race this court has not heretofore enunciated it. *On the contrary, this court has repeatedly stated that the equal protection clause of the Fourteenth Amendment is applicable to all races alike.* In *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, this court, under footnote 5, quotes the following from *Struder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664:

> "It ordains that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the states shall be the same for the black and for the white*; that *all persons whether colored or white, shall stand equal before the laws of the states* . . ." (Emphasis supplied)

The holdings of this court on the matter of equal treatment for all are well summarized by the supreme court of New Jersey in the case of *Washington National Insurance Co. v. Board of Review*, (N.J.) 64 A.2d 443, as follows:

> ". . . While the due process and equal protection guarantees are not coterminous in their spheres of

> protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class. *The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed. Hartford Steam Boiler Inspection & Insurance Co. v. Harrison,* 301 U.S. 459, 57 S.Ct. 838, 81 L.Ed. 1223 (1937); *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation,* 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109 (1936); *Concordia Fire Insurance Co. v. Illinois,* 292 U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411 (1934); *Sproles v. Binford,* 286 U.S. 374, 52 S.Ct. 581, 76 L.Ed. 1167 (1932); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation,* 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923); *Truax v. Corrigan,* 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254 (1921); *Smith v. Texas,* 233 U.S. 620, 34 S.Ct. 681, 58 L.Ed. 1129 (1914); *Atchison, Topeka & Santa Fe R. Co. v. Matthews,* 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909 (1899) . . ." (Emphasis ours)

The Washington Supreme Court points out on page A23 of its opinion:

> "However, the minority admissions policy was certainly not benign with respect to non-minority students who are displaced by it."

For the person who is denied the right to benefits of a federally funded program, it is little compensation that in the philosophy of someone, a social end is being promoted. The Washington Supreme Court has specifically held in

this case that benefits may be denied on the basis of race "if the racial classification is used in a compensatory way to promote integration". This philosophy of the Washington court is comparable to a philosophy that would allow the uncompensated taking of private property for public use because a public purpose may be served.

There is involved in this case a matter as fundamental as whether the individual constitutional rights of a citizen are so fragile that they are swept aside whenever a divided state court believes there is an overriding state interest.

The opinion of the Washington Supreme Court undertakes by classifying citizens to apply the laws differently to different classes. The opinion recites that in reviewing the files of minority applicants, the committee attached less weight to grade and test records of minority applicants than it did to those of other races. This was clearly an award of special privileges to the select races. General applicants did not have the privilege of having grade and test scores disregarded if such grade and test scores would result in their summary rejection. Blacks, American Indians and Chicanos *did have this privilege*. This is clear from the opinion where the court said:

> "However, the purpose of the racial classification here is to give *special consideration* to those *racial minority groups* which are unrepresented in the law schools and legal profession and which cannot secure proportionate representation if strictly subjected to the standardized mathematical criteria for admission to the law school." (Emphasis added).

All other races were subjected to these standardized mathematical criteria. It was a *special privilege* for the selected minorities to be so specially treated. The general students were not given equal protection of the laws. The

opinion has set aside the guarantee to citizens that they will not be disadvantaged by special privileges and immunities accorded to others by calling this an act of "classification," and justifying it on the ground of an "overriding state interest."

The proposition that one can be classified out of fundamental constitutional rights is startling.

Making *selected* minorities a separate class to have the privilege of being judged by more favorable criteria than the plaintiff was a denial of the *equal protection of the laws.*

If equal protection of the laws can be denied to a citizen on the basis of an "overriding state interest", then with equal facility upon the finding of an overriding state interest, all other rights guaranteed by the declaration of rights of our Constitution can be disregarded, and persons can be deprived of life, liberty and property without due process of law (Amendment 14, Section 1). They can be deprived of the right to exercise religious freedom (Amendment 1). They can be subjected to unreasonable searches and seizures (Amendment 4). They can be deprived of the right of habeas corpus (Article 1, Section 9, ¶2). They can be deprived of the right to petition and assemble (Amendment 1). They can be subjected to cruel and unusual punishment (Amendment 8).

The philosophy of the opinion of the Washington Supreme Court makes all of these guaranteed rights inviolate only so long as the court shall not in the philosophy of the current members find that there is no "overriding state interest."

All of those guaranteed rights of the federal Constitution are actually involved in this case. The federal questions involved are enormous.

In the present case, if the establishment of a class of minority citizens who can have the privilege of entering the University of Washington Law School on more favorable terms than citizens generally, is accepted then the interest of the individual who is excluded has been disregarded and swept away.

This court has held that a reasonable relationship to a desirable state interest is not sufficient to justify taking away guaranteed constitutional rights, but something *extreme* and *compelling* and *constituting a clear and present danger* is necessary to meet the test when we are speaking of *depriving citizens of rights guaranteed under the Constitution*. This principle is stated by this court in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530, 89 L.Ed. 430, 440, 65 S.Ct. 315. No such abuse or danger has been advanced in the present case."

In this case there is no evidence of any grave abuse which would justify depriving DeFunis of consideration as favorable as that given to the selected so-called minority races.

The right to classify is an attribute of governmental authority up to the point that it begins to encroach upon the

rights of citizens guaranteed by the Constitution. *Whenever a classification is based upon race it is suspect. Loving v. Virginia,* 388 U.S. 1, 18 L. Ed. 2d 1010. That kind of classification must meet a test much greater than merely whether it is reasonably related to legitimate public purposes. If the citizen is to be deprived of a guaranteed right, it must arise from a compelling or over-riding reason, not merely because it is related to a policy that by a majority of the Court is deemed desirable.

In the present case, the objective which would cause DeFunis to be deprived of the right to be judged by the same criteria as the members of the selected "minorities" has not even been enunciated by a legislative body as a desirable end to be accomplished and whether the court considers it an important objective, it can hardly be contended that failure to accomplish the objective of increasing the number of minority lawyers regardless of qualification is so overriding as to threaten the *public safety or welfare.*

While the equal protection clause does not require in every case an absolute mathematical equality in the application of the laws, this Court has on numerous occasions reiterated the fact that it takes an *overwhelming necessity* to permit a person to be classified out of his constitutional rights. Such necessity is not established lightly.

In *Thomas v. Collins,* 323 U.S. 516, 89 L. Ed. 430, this Court discusses the type of necessity that will permit a citizen to be classified out of his rights.

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate is perhaps more so

where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. Irvington*, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146; *Cantwell v. Connecticut*, 310 U.S. 296, 84 L.Ed. 1213, 60 S.Ct. 900, 128 ALR 1352; *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed. 645, 64 S. Ct. 438. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States v. Carolene Products Co.*, 304 U.S. 144, 152, 153, 82 L.Ed. 1234, 1241, 1242, 58 S.Ct. 778.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation."

It will be noted from the foregoing quotation that the court points out that the rational connection between a remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process, will not suffice where an individual is to be deprived of a guaranteed constitutional right.

The constitution guaranteed DeFunis that no citizen or class of citizens regardless of race would have special privileges or immunities which on the same terms did not belong to him.

The opinion dispenses with that guarantee.

If the principles established in the opinion remain law, none of the liberties guaranteed by the Declaration of Rights in our Constitution are safe against the needs of

the state whenever a majority of the court can be convinced of the States' needs.

This case has received nationwide attention. It has been commented on *editorally* throughout the country and has been publicized in numerous nationwide publications.

A further indication of the importance attached to this case by the legal profession is the number of briefs amici curiae which were filed in the Washington Supreme Court by lawyers and various interests. The record will show some thirteen separate such amici curiae briefs were entered.

This case presents issues which should be decided by this Court at an early date. The federal questions involved are substantial and extremely important.

Respectfully submitted,

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APPENDIX A

[No. 42198. En Banc. March 8, 1973.]

MARCO DE FUNIS *et al.*, *Respondents, v.* CHARLES ODEGAARD *et al.*, *Appellants.*

[1] Action—Standing—In General. A party showing a clear legal or equitable right and a well-grounded fear of immedate invasion of that right has standing to maintain an action.

[2] Constitutional Law—Equal Protection—Classification—By Race—In General. Racial classification is permissible, and may be mandatory in selected instances, inasmuch as only those classifications for invidious purposes are, per se, violative of the equal protection clause of the federal constitution.

[3] Constitutional Law—Equal Protection—Classification—By Race—Purpose—Effect. Mandatory racial classification for purposes of remedying the effects of past segregation, promoting integration of the races, or preventing the perpetuation of discrimination is not invidious nor violative of constitutional rights to equal protection.

[4] Constitutional Law—Equal Protection—Classification—By Race—Loss of Benefit—Effect. The loss of a potential benefit to a party as a result of the implementation of racial classifications being utilized in a compensatory fashion to promote integration is not per se a denial of equal protection.

[5] Colleges and Universities—Constitutional Law—Equal Protection Classification—By Race—Admission Policies. Classification of candidates for admission to a state college or university on the basis of race, and favorable consideration of one race over another as a factor in the school's admission policy, when the purpose of such classification is to promote integration and to undo the effects of past discrimination is not, per se, violative of the equal protection clause of the federal constitution.

[6] Constitutional Law—Equal Protection—Classification —By Race—Justification—Burden. The burden of showing that racially discriminatory classifications are necessary to promote a compelling and permissible state objective is upon the state.

[7] Colleges and Universities—Constitutional Law—Equal Protection — Classification — By Race — Compelling State Interest. The elimination of serious racial imbalances caused by the underrepresentation of certain minorities within public legal education constitutes a compelling state interest.

[8] Constitutional Law—Segregation—De facto or De jure —Effect. Whether a pattern of racial segregation is de jure or de facto is of no effect in examining the constitutionality of a state effort to eliminate such segregation.

[9] Constitutional Law—Segregation—De facto—Duty to Act. While there may be no requirement for public officials to affirmatively seek to remove examples of de factor racial segregation, voluntary efforts are permissible.

[10] Colleges and Universities — Constitutional Law — Equal Protection—Classification—By Race—Necessity. The providing of increased educational opportunities to selected racial minorities by favoring such minorities in college or university admission policies is necessary where racial imbalance in both the school and in the fields or professions it serves exists and should be eliminated.

[11] Colleges and Universities — Constitutional Law — Equal Protection—Classification—By Race—Scope. The awarding of favorable treatment on the basis of race to selected minorities during the process of admitting students to a state college or university, for the purpose of correcting racial imbalance in the student body, may be limited to those minorities which are most seriously underrepresented in the school.

[12] Administrative Law and Procedure—Discretionary Action—Validity—Test. A determination by an administrative body is not arbitrary or capricious when exercised honestly and upon due consideration of the facts if there is room for two opinions even though a reviewer may believe an erroneous conclusion was reached.

[13] Administrative Law and Procedure—Discretionary Action—Validity—Review. In the absence of a showing of a violation of a party's constitutional rights, discretionary determinations of an administrative body may not be overturned on review unless shown to be arbitrary or capricious.

[14] Colleges and Universities — Students — Selection — Residents—Effect. State colleges or universities, while required to assess additional tuition upon nonresident students, are not required to give preferential admission treatment to residents over nonresidents.

Wright, Finley, and Stafford, JJ., concur by separate opinion; Hale, C.J., and Hunter, J., dissent by separate opinions; Rosellini and Brachtenbach, JJ., did not participate in the disposition of the case.

Appeal from a judgment of the Superior Court for King County, No. 741727, Lloyd Shorett, J., entered October 18, 1971. *Reversed.*

Action challenging university admission procedures. The defendants appeal from a judgment in favor of the plaintiffs.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,

Respondents,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT and RICHARD L. RODDIS, Admissions Committee of University of Washington Law School; HAROLD S. SHEFFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP, and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Appellants.

No. 42198
EN BANC

FILED
MARCH 8, 1973

Defendants, who include the members of the Board of Regents of the University of Washington, the President of the University, and the Dean and certain members of the Admissions Committee of the University of Washington School of Law, appeal from a judgment ordering them to admit plaintiff Marco DeFunis, Jr., as a first-year student to the University of Washington School of Law, as of September 22, 1971.

Broadly phrased, the major question presented herein is whether the law school may, in consonance with the equal protection provisions of the state and federal constitutions, consider the racial or ethnic background of applicants as one factor in the selection of students.

Marco DeFunis, Jr. (hereinafter plaintiff), his wife, and his parents commenced an action in the superior court, alleging that plaintiff, an applicant for admission to the University of Washington School of Law (hereinafter law school) for the class commencing September 1971, had been wrongfully denied admission in that no preference was given to residents of the state of Washington in the admissions process and that persons were admitted to the law school with lesser qualifications than those of plaintiff. The complaint asked that the court order the defendants to admit and enroll plaintiff in the law school in the fall of 1971 and, upon the failure of defendants to do so, that plaintiffs recover damages in the sum of not less than $50,000.

The superior court granted a temporary restraining order and order to show cause, restraining defendants from selecting students for admission to the law school during the pendency of the action. Defendants, in turn, moved to dismiss the complaint on the grounds that the court lacked jurisdiction of the cause and that the complaint failed to state a claim upon which relief could be granted.

The superior court dismissed that portion of the plaintiff's complaint seeking monetary damages. The balance of defendants' motion to dismiss was denied, and a temporary injunction was entered enjoining the defendants from admitting students to the law school "in a number which would preclude the admission of plaintiff, Marco DeFunis, Jr., to the 1971-72 first year class, should his admission eventually be ordered by the court." After a nonjury trial, the court ruled that in denying plaintiff admission to the law school, the University of Washington had discriminated against him in violation of the equal protection of the laws guaranteed by the fourteenth amendment to the United States Constitution.

Law school admissions pose a complex problem, and require a sensitive balancing of diverse factors. To gain insight into the complicated process of selecting first-year law students, and to better appreciate the essence of plaintiff's complaint against the law school, we turn first to the circumstances and operative facts—as delineated by the record—from which this litigation arises.

Under RCW 28B.20.130(3), the Board of Regents of the University of Washington has the power and duty to establish entrance requirements for students seeking admission to the University. The dean and faculty of the law school, pursuant to the authority delegated to them by the Board of Regents and the President of the University, have established a Committee on Admissions and Readmissions to determine who shall be admitted to the law school. For the academic year September 15, 1970, to June 15, 1971, the committee was composed of five faculty members and two student members; on June 7, 1971, the faculty of the law school expanded the membership of the committee to six faculty members and three student members. The chairman estimated that the committee spent over 1,300 hours in the selection process for the 1971-72 first-year class.

The number of qualified applicants to the law school has increased dramatically in recent years. In 1967, the law school received 618 applications; in 1968, 704; in 1969, 860; and in 1970, 1026 applications were received. The law school received 1601 applications for admission to the first-year class beginning September, 1971. Under the University's enrollment limitation there were only 445 positions allotted to the law school, and of these the number available for the first-year class was between 145 and 150. The chairman of the admissions committee stated that most of these applicants would be regarded as qualified by admissions standards at this and other comparable law schools in recent years. Hence, the task of selection is difficult, time-consuming and requires the exercise of careful and informed discretion, based on the evidence appearing in the application files. While many applicants are relatively easy to select for admission because of very outstanding qualifications, and others are relatively easy to reject, the middle group of candidates is much more difficult to assess. Plaintiff was in this latter category.

Applicants for admission to the law school must have earned an undergraduate degree and taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, New Jersey. They must also submit with their written application a copy of transcripts from all schools and colleges which they have attended

prior to application for admission, together with statements from their undergraduate dean of students and letters of recommendation from faculty members in their major field of study. They may submit additional letters of recommendation and statements. The application for admission gives the applicant the option to indicate his "dominant" ethnic origin. The admissions process does not include personal interviews and does not reveal whether applicants are poor or affluent.

The committee's basic criteria for selecting students are expressed in the "Guide for Applicants", a copy of which plaintiff received with his 1971 application:

> We below describe the process we applied to determine the class that entered the University of Washington School of Law in September 1970. We anticipate that the same process will be applied in determining membership in the class of 1971.
>
> . . .
>
> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.

For the purpose of a preliminary ranking of the applicants for the class of 1974, the junior-senior undergraduate grade point average and the Law School Admissions Test scores[1] for each applicant were combined through a formula to yield a predicated first-year of law school grade average for the applicant. This preliminary index number is called the Predicted First-Year Average (PFYA). The relative weight of grades and test scores in this formula was determined on the basis of past experience at the law school. The same formula is used for all applicants in a given year. If an applicant has taken the LSAT more than once in the past 3 years, the average score is employed rather than the latest score; this is done to offset a learning effect which statistical studies by the Educational Testing

1. The Law School Admissions Test yields two scores for each candidate, a general law aptitude score and a writing ability score.

Service indicates occurs as the result of the multiple taking of the test.

Plaintiff's PFYA, as determined by the law school, was 76.23. This figure was calculated by using a formula combining plaintiff's junior-senior grade point average of 3.71, average LSAT score of 582 (512 plus 566 plus 668, divided by 3)[2] and average writing test score component of 61 (62 plus 58 plus 64, divided by 3).

Ranking of applicants by PFYA was used to help organize the committee's processing of the applications. On the basis of the previous year's applicant group, the committee decided that most promising applicants for the class of 1974 would be defined as applicants with predicted first-year law school averages over 77. Applicants with PFYAs above 77 were reviewed and decided by the full committee as they came in, in order to reach an early decision as to the acceptance of such students. Each of these files was assigned to a committee member for thorough review and for presentation to the committee.

Applicants with PFYAs below 74.5 were reviewed by the chairman of the committee, and were either rejected by him, or placed in a group for later review by the full committee. The decision of rejection or committee review of an application was based on the chairman's judgment derived from information in the applicant's file indicating whether the applicant had a significantly better potential for law study than the relatively low predicted first-year average tended to indicate. Cases of doubt were to be resolved in favor of deferring judgment until committee review could be undertaken.

Two exceptions were made in regard to applicants with PFYAs below 74.5. First, the law school had established a policy that persons who had been previously admitted but who were unable to enter, or forced to withdraw from, the law school because of induction into the military service, had a right to reenroll if they reapplied immediately upon honorable completion of their tour of duty. Second, all files of "minority" applicants (which the committee de-

2. Plaintiff took the Law School Admissions test on three different occasions: August 1969, November 1969 and December 1970.

fined for this purpose as including Black Americans, Chicano Americans, American Indians and Philippine Americans[3]) were considered by the full committee as warranting their attention, regardless of the PFYA of the individual applicant.

Applicants with predicted first-year averages between 74.5 and 76.99 were accumulated and held until the applications deadline had passed and essentially all the applications were complete and ready for review, so that the critical decisions as to the remainder of the incoming class could be made with a relatively complete view of qualified applicants not therebefore admitted. Plaintiff's application, presenting a 76.23 predicated first-year average, was placed in this third category. Included for consideration at that time, in addition to the minority group and those with PFYAs between 74.5 and 77, were some applicants with PFYAs above 77 upon whom the committee had reserved judgment, feeling that such applicants were not as promising as their PFYAs seemed to indicate.

These "close cases,"—*i.e.*, where the applicant was neither clearly outstanding nor clearly deficient—required the most effort of the committee. In selecting the applicants from this narrow range, the committee used the process described in its Guide for Applicants, a copy of which was sent to all applicants:

> We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

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3. The chairman of the admissions committee testified that Asian-Americans, *e.g.*, were not treated as "minority" applicants for admissions purposes, since a significant number could be admitted on the same basis as general applicants.

As used herein, the term "minority" refers to and includes only Black Americans, Chicano Americans, American Indians and Philippine Americans.

An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extra-curricular and community activities, employment, and general background.

We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.

Each file to be reviewed by the full committee was first assigned and read by a committee member who reported on its contents to the committee. There followed a discussion on the applicants under consideration, leading to a committee vote on the disposition of the application. Assignment of files to the committee member for initial reading was usually on a random basis. The files of Black applicants, however, were assigned to and separately read by both Professor Geoffrey Crooks and Mr. Vincent Hayes, the two committee members thought best equipped to report to the full committee on the contents of the file. Professor Crooks worked with minority applications during the summer of 1970 as director of the school's Council on Legal Education Opportunities (CLEO) program[4] and Mr. Hayes, a second-year Black law student, who previously served as director of the Governor's Multi-Service Center in Seattle, a job involving considerable personnel evaluation. Applications of Chicanos, American Indians and Filipinos were reviewed by Associate Dean Robert S. Hunt for presentation to the committee.

In considering minority applicants, the committee was guided by a University-wide policy which sought to eliminate the continued effects of past segregation and discrimination against Blacks, Chicanos, American Indians and other disadvantaged racial and ethnic minority groups. At

4. A federally (OEO) funded program, sponsored by the American Bar Association, the American Association of Law Schools, the National Bar Association and the Law School Admission Council, which provides summer training programs and financial assistance to disadvantaged college students seeking admission to law school.

trial, the President of the University of Washington testified as to the origin of this policy:

> More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the University and the University of Washington, in particular, given the racial distribution of this state.
>
> . . .
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> So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.

Thus, the University sought to achieve a reasonable representation within the student body of persons from these groups which have been historically suppressed by encouraging their enrollment within the various programs offered at the University. Policies for admission of minorities throughout the University recognized that the conventional "mechanical" credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the University.

The law school sought to carry forward this University policy in its admission program, not only to obtain a reasonable representation from minorities within its classes, but to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system. In doing so, the Admissions Committee followed

certain procedures which are the crux of plaintiff's claimed denial of equal protection of the laws.

First, in reviewing the files of minority applicants, the committee attached less weight to the PFYA in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school. Also, the chairman testified that although the same standard was applied to all applicants (*i.e.*, the relative probability of the individual succeeding in law school), minority applicants were directly compared to one another, but were not compared to applicants outside of the minority group. The committee sought to identify, within the minority category, those persons who had the highest probability of succeeding in law school. Thus, the law school included within its admitted group minority applicants whose PFYAs were lower than those of some other applicants, but whose entire record showed the committee that they were capable of successfully completing the law school program.[5]

As a result of this process, the committee admitted a group of minority applicants, placed a group of such applicants on a waiting list, and rejected other minority applications. The dean of the law school testified that the law school has no fixed admissions quota for minority students, but that the committee sought a reasonable representation of such groups in the law school. He added that the law school has accepted no unqualified minority applicants, but only those whose records indicated that they were capable of successfully completing the law school program.

The admissions committee sent letters of acceptance to over 200 applicants. Normal attrition among those invited was expected to reduce this group to produce a class of about 150. Against the possibility of unusually high attrition aming the group of accepted applicants, the committee placed approximately 155 additional applicants on a waiting list. The waiting list was ranked in approximate quartiles, with 46 applicants in the highest quartile, 38 applicants in the second quartile, 36 applicants in the third quartile, and 33 applicants in the fourth or lowest quartile.

5. For example, many of the minority group applicants were first screened through special compensatory summer programs, operated primarily by CLEO.

The remaining applicants—those receiving neither offers of acceptance nor waiting list assignments—received letters of denial. Plaintiff received an invitation to be placed on the waiting list and he was ranked in the fourth or lowest quartile. On July 21, 1971, the rate of attrition from the admitted applicants appearing to be within normal ranges, the committee decided to send letters of denial to those applicants in the third and fourth quartiles on the waiting list. Plaintiff was thus notified on August 2, 1971, that he was neither admitted nor any longer on the waiting list. As of August 1, 1971, 275 students were admitted to the frehman law school class and 55 students remained on the waiting list, making a total of 330 students.

Out of the 275 students given notice of admission, 127 were nonresidents of the state of Washington. Out of the 55 on the waiting list, 23 were nonresidents of the state of Washington. Thus, of the 330 applicants admitted or waiting, 180 were residents of the state of Washington. Ultimately, 32 non-residents (21.6 per cent of the entering class) actually enrolled in the first-year class.

Because of the judgmental factors in the admissions process, as outlined, the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority group students invited 18 actually enrolled in the first-year class.

The trial court found that some minority applicants with college grades and LSAT scores so low that had they been of the white race their applications would have been summarily denied, were given invitations for admission; that some such students were admitted instead of plaintiff; that since no more than 150 applicants were to be admitted to the law school, the admission of less qualified students resulted in a denial of places to those better qualified; and that plaintiff had better "qualifications" than many of the students admitted by the committee. The trial court also

found that plaintiff was and is fully qualified and capable of satisfactorily attending the law school.

The trial court concluded that there is no constitutional restriction upon admitting nonresidential students; and no laws or regulations provide preference to residential students over nonresidential students for admission to the University of Washington School of Law; that, in denying plaintiff admission to the law school, the University of Washington discriminated against him and did not accord to him equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution; and therefore, that plaintiff should be admitted to the law school for the class of 1974, beginning September 22, 1971.[6]

I.

We first consider defendants' threshold contention that the record establishes the law school would not have been able to accept him even if no minority students had been admitted; and, therefore, plaintiff has no standing to question the University's minorities admissions policy. Defendants' argue that the committee's evaluation of plaintiff's qualifications led it to place him in the fourth, or lowest, quartile of the waiting list. This low ranking was wholly without regard to the school's minority admissions policy, but was based on a comparison of plaintiff's qualifications with those of other nonminority applicants. Thus, contend defendants, even if the minority group students had not been admitted, all of the seats they occupied would probably have been filled by others higher than plaintiff on the waiting list.

There is no way of knowing that plaintiff would have been admitted to the law school, even had no minority student been admitted. We do not agree, however, that for this reason plaintiff lacks standing to assert the constitutional questions presented herein. As noted by the United

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6. At time of oral argument in this court it was stated that plaintiff had actually been admitted to the law school in September, 1971, and was still in attendance. Due to the conditions under which plaintiff was admitted and the great public interest in the continuing issues raised by this appeal, we do not consider the case to be moot.

States Supreme Court in *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968):

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

We have heretofore made similar statements. In *State ex rel. Hays v. Wilson*, 17 Wn.2d 670, 137 P.2d 105 (1943), we stated that one seeking relief must show a clear legal or equitable right and a well-grounded fear of immediate invasion of that right. Further, in *State v. Human Relations Research Foundation*, 64 Wn.2d 262, 269, 391 P.2d 513 (1964), we stated:

> A litigant who challenges the constitutionality of a statute must claim infringement of an interest peculiar and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute.

Plaintiff's interest in this litigation clearly constitutes the requisite "personal stake in the outcome of the controversy" necessary to request an adjudication of the merits of this case.[7]

II.

The essence of plaintiff's Fourteenth Amendment argument is that the law school violated his right to equal protection of the laws by denying him admission, yet accepting certain minority applicants with lower PFYAs than plaintiff who, but for their minority status, would not have been admitted.[8]

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7. In reaching this conclusion we have also taken into consideration the University's urgent need for certainty in planning and administering its admissions policy.

8. Our review is specifically limited to a consideration of the alleged constitutional infirmities in the law school's admissions policy and procedures. Beyond question, it would be inappropriate for this court to determine the actual composition of the first year class through an independent evaluation of each applicant's file, substituting our criteria

To answer this contention we consider three implicit, subordinate questions: (A) whether race can ever be considered as one factor in the admissions policy of a state law school or whether racial classifications are *per se* unconstitutional because the equal protection of the laws requires that law school admissions be "color-blind"; (B) if consideration of race is not *per se* unconstitutional, what is the appropriate standard of review to be applied in determining the constitutionality of such a classification; and (C) when the appropriate standard is applied does the specific minority admissions policy employed by the law school pass constitutional muster[9]?

A.

Relying solely on *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), the trial court held that a state law school can never consider race as one criterion in its selection of first-year students. In holding that all such racial classifications are *per se* unconstitutional the trial court stated in its oral opinion:

> Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group have not, in my opinion, been accorded equal protection of the laws guaranteed by the Fourteenth Amendment.

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and judgment for those of the Admissions Committee. In regard to the scope of judicial review in this area, the United States Supreme Court has stated that:

> In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

9. Considering the statutory delegation of power to establish entrance requirements for students to the University, no serious question is raised as to whether the action of the law school here complained of constitutes "state action" within the meaning of the Fourteenth Amendment.

> In 1954 the United States Supreme Court decided that public education must be equally available to all regardless of race.
>
> After that decision the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all races alike, and I feel that is what is required under the equal protection clause.

In *Brown v. Board of Education, supra,* the Supreme Court addressed a question of primary importance at page 493:

> Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

The Court in *Brown* held the equal protection clause of the Fourteenth Amendment prohibits state law from requiring the operation of racially segregated, dual school systems of public education and requires that the system be converted into a unitary, nonracially segregated system. In so holding, the Court noted that segregation inevitably stigmatizes Black chidren:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

Brown v. Board of Education, supra, at page 494.

Moreover, "The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group." Id. at page 494.

Brown did not hold that all racial classifications are *per se* unconstitutional; rather, it held that invidious racial classifications—*i.e.*, those that stigmatize a racial group with the stamp of inferiority—are unconstitutional. Even viewed in a light most favorable to plaintiff, the "prefer-

ential" minority admissions policy administered by the law school is clearly not a form of invidious discriminiation. The goal of this policy is not to separate the races, but to bring them together. And, as has been observed,

> Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites.

O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699, 713 (1971).

While *Brown v. Board of Education, supra*, certainly provides a starting point for our analysis of the instant case, we do not agree with the trial court that *Brown* is dispositive here. Subsequent decisions of the United States Supreme Court have made it clear that in some circumstances a racial criterion *may* be used—and indeed in some circumstances *must* be used—by public educational institutions in bringing about racial balance. School systems which were formerly segregated de jure[10] now have an affirmative duty to remedy racial imbalance.

In *Green v. County School Board*, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968), the Supreme Court considered a school board's adoption of a "freedom-of-choice"

10. "De jure" segregation generally refers to "segregation directly intended or mandated by law or otherwise issuing from an official racial classification," *Hobson v. Hansen*, 269 F. Supp. 401, 492 (D.D.C. 1967), *aff'd sub. nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), or, in other words, to segregation which has, or had, the sanction of law. In the context of public education the United State Supreme Court has expanded the meaning of the term "de jure segregation"

> [T]o comprehend any situation in which the activities of school authorities have had a racially discriminatory impact contributing to the establishment or continuation [of racial imbalance] . . .

State ex rel. Citizens Against Mandatory Bussing v. Brooks, 80 Wn.2d 121, 130, 492 P.2d 536 (1972).

Where the segregation is inadvertent and without the assistance or collusion of school authorities, and is not caused by any "state action," but rather by social, economic and other determinants, it will be referred to as "de facto" herein. *See Fiss, Racial Imbalance in the Public Schools: the Constitutional Concepts*, 78 Harv. L. Rev. 564, 565-66, 584, 598 (1965).

plan which allowed a student to choose his own public school. No student was assigned or admitted to school on the basis of race. In holding that, on the facts presented, the plan did not satisfy the board's duty to create a unitary, nonracial system, the Court stated at pages 437-440:

> In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former "white" school to Negro children and of the "Negro" school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual segregated system.
>
> . . .
>
> The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

As Judge Sobeloff has put it,

> " 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.' " *Bowman v. County School Board*, 382 F.2d 326, 333 (C.A. 4th Cir. 1967 (concurring opinion).

Pursuing this principle further, the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), unanimously held that school authorities, in seeking to achieve a unitary, nonracial system of public education, need not be "color-blind," but may consider race as a valid criterion when considering admissions and producing a student body:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society

> each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

The Supreme Court then approved the District Court's opinion requiring the school authorities to consider race in determining the composition of individual schools:

> As we said in *Green*, a school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness. Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations.

Swann v. Charlotte-Mecklenburg Board of Education, supra, at page 25.

Thus, the Constitution is color conscious to prevent the perpetuation of discrimination and to undo the effects of past segregation. In holding invalid North Carolina's anti-bussing law, which flatly forbade assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools and which prohibited bussing for such purposes, the Court stated:

> [T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind;" that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*, 347 U.S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.

North Carolina State Board of Education v. Swann, 402 U.S. 43, 45, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971). *Accord, United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (1967), *cert. denied sub nom. Board of Education of*

Bessemer v. United States, 389 U.S. 840, 19 L. Ed. 2d 104, 88 S. Ct. 77 (1967).

Clearly, consideration of race by school authorities does not violate the Fourteenth Amendment where the purpose is to bring together, rather than separate, the races. The "minority" admissions policy of the law school, aimed at insuring a reasonable representation of minority persons in the student body, is not invidious. Consideration of race is permissible to carry out the mandate of *Brown*, and, as noted, has been required in some circumstances.

However, plaintiff contends that cases such as *Green v. County School Board, supra*, and *Swann v. Charlotte-Mecklenburg Board of Education, supra*, are inapposite here since none of the students there involved were deprived of an education by the plan to achieve a unitary school system. It is questionable whether defendants deprived plaintiff of a legal education by denying him admission.[11] But even accepting this contention, arguendo, the denial of a "benefit" on the basis of race is not necessarily a *per se* violation of the Fourteenth Amendment, if the racial classification is used in a compensatory way to promote integration.

For example, in *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944, 29 L. Ed. 2d 112, 91 S. Ct. 1612 (1971), a group of white teachers alleged that the school board had bypassed them in abolishing the regular promotion schedule and procedure for selecting principals and vice-principals, and had given priority to Black candidates in order to increase the integration of the system's faculty. In upholding the board's judgment to suspend the ordinary promotion system upon racial considerations, the court stated:

> State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment.

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11. Plaintiff alleged in his complaint that he had previously applied to, and been accepted by, the law school at each of the following universities: University of Oregon, University of Idaho, Gonzaga University and Willamette University.

Porcelli v. Titus, supra, at page 1257.

Similarly, the Eighth Circuit concluded that in order to eradicate the effects of past discrimination,

> [I]t would be in order for the district court to mandate that one out of every three persons hired by the [Minneapolis] Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired.

Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971); *cert. denied* 406 U.S. 950 (1972). Thus, the court ordered the department to hire minority applicants, although in doing so a more qualified nonminority applicant might be bypassed. *Cf. Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854 (1971).

We conclude that the consideration of race as a factor in the admissions policy of a state law school is not a *per se* violation of the equal protection clause of the Fourteenth Amendment. We proceed, therefore, to the question of what standard of review is appropriate to determine the constitutionality of such a classification.

B.

Generally, when reviewing a state-created classification alleged to be in violation of the equal protection clause of the Fourteenth Amendment, the question is whether the classification is reasonably related to a legitimate public purpose. And, in applying this "rational basis" test "[A] discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426, 6 L. Ed. 2d 393, 81 S. Ct. 1101 (1961).

However, where the classification is based upon race, a heavier burden of justification is imposed upon the state. In overturning Virginia's antimiscegenation law, the Supreme Court explained this stricter standard of review:

> The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources

> of invidious racial discrimination in the States. (Citations omitted.]
>
> . . . At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," [citation omitted] and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. . .
>
> There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.

Loving v. Virginia, 388 U.S. 1, 10-11, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967). *Accord, McLaughlin v. Florida*, 379 U.S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964); *Hunter v. Erickson*, 393 U.S. 385, 21 L. Ed. 2d 616, 89 S. Ct. 557 (1969).

It has been suggested that the less strict "rational basis" test should be applied to the consideration of race here, since the racial distinction is being used to redress the effects of past discrimination; thus, because the persons normally stigmatized by racial classifications are being benefited, the action complained of should be considered "benign" and reviewed under the more permissive standard. However, the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it. *See* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699, 710 (1971).

The burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest.

C.

It can hardly be gainsaid that the minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—of this state and this

nation.[12] We believe the state has an overriding interest in promoting integration in public education. In light of the serious underrepresentation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling.

Plaintiff contends, however, that any discrimination in this case has been de facto, rather than de jure. Thus, reasons plaintiff, since the law school itself has not actively discriminated against minority applicants, it may not attempt to remedy racial imbalance in the law school student body, and, consequently, throughout the legal profession. We disagree.

In *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 128, 492 P.2d 536 (1972), we held that whether the nature of segregation is de jure or de facto is of no consequence where a voluntary plan of eliminating racial imbalance is adopted by school officials:

> Reason impels the conclusion that, if the constitution supports court directed mandatory bussing to desegregate schools in a system which is dual "de jure," then such bussing is within the appropriate exercise of the

12. Report of Black Lawyers and Judges in the United States, 1960-70, 91st Cong., 2d Sess., 116 Cong. Rec. 30786 (1970); U.S. Dept. of Commerce, Bureau of Census, General Population Characteristics of the State of Washington, Tables 17 and 18 (1970); Office of Program Planning and Fiscal Management of the State of Washington, Pocket Data Book (1971); Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. Tol. L. Rev. 321 (1970); Edwards, *A New Role for the Black Law Graduates—A Reality or an Illusion?* 69 Mich. L. Rev. 1407 (1971); Gelhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069 (1968); Reynoso, *Laraza, the Law and the Law Schools*, 1970 U. Tol. L. Rev. 809 (1970); Toles, *Black Population and Black Judges*, 17 Student Lawyer J. 20 (Feb. 1972); O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281 (1970); Atwood, *Survey of Black Law Student Enrollment*, 16 Student Lawyer J. 18 (June 1971); Comment, *Selected Bibliography: Minority Group Participation in the Legal Profession*, 1970 U. Tol. L. Rev. 935 (1970).

In relying on statistical evidence to establish the underrepresentation of minority groups in the legal profession, defendants are supported by ample precedent. *See, e.g., Hobson v. Hansen, supra*, footnote 10.

> discretion of school authorities in a system which is dual "de facto."

This conclusion is supported by the reasoning of the district court in *Barksdale v. Springfield School Committee*, 237 F. Supp. 543, 546 (D. Mass. 1965), *vacated on other grounds*, 348 F.2d 261 (1st Cir. 1965):

> It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors.

Significantly, this case does not present for review a court order imposing a program of desegregation. Rather, the minority admissions policy is a voluntary plan initiated by school authorities. Therefore, the question before us is not whether the Fourteenth Amendment *requires* the law school to take affirmative action to eliminate the continuing effects of de facto segregation; the question is whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy. In refusing to enjoin school officials from implementing a plan to eradicate de facto school segregation by the use of explicit racial classifications, the Second Circuit observed: "That there may be no constitutional duty to act to undo de facto segregation, however, does not mean that such action is unconstitutional." *Offermann v. Nitkowski*, 378 F.2d 22, 24 (2d Cir. 1967).

The de jure-de facto distinction is not controlling in determining the constitutionality of the minority admissions policy voluntarily adopted by the law school.[13] Further, we see no reason why the state interest in eradicating the continuing effects of past racial discrimination is less merely because the law school itself may have previously been neutral in the matter.

The state also has an overriding interest in providing *all* law students with a legal education that will adequately

13. We do not, therefore, reach the question of whether there is an inherent cultural bias in the Law School Admission Test, or in the methods of teaching and testing employed by the law school, which perpetuates racial imbalance to such an extent as to constitute de jure segregation.

prepare them to deal with the societal problems which will confront them upon graduation. As the Supreme Court has observed, this cannot be done through books alone:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634, 94 L. Ed. 1114, 70 S. Ct. 848 (1950).

The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the state in producing a racially balanced student body at the law school is compelling.

Finally, the shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest.[14] If minorities are to live within the rule of law, they must enjoy equal representation within our legal system.

Once a constitutionally valid *state interest has been established,* it remains for the state to show the requisite connection between the racial classification employed and that interest. The consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived.

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14. *See* O'Neil, *Preferential Admissions: Equalizing Access to Legal Education, supra,* footnote 12.

It has been suggested that the minority admissions policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law schools through direct competition with nonminority applicants on the basis of the same academic criteria. This would be highly desirable, but 18 years have passed since the decision in *Brown v. Board of Education, supra,* and minority groups are still grossly underrepresented in law schools. If the law school is forbidden from taking affirmative action, this underrepresentation may be perpetuated indefinitely. No less restrictive means would serve the governmental interest here; we believe the minority admissions policy of the law school to be the only feasible "plan that promises realistically to work, and promises realistically to work *now.*" *Green v. County School Board, supra,* at page 439.

We conclude that defendants have shown the necessity of the racial classification herein to the accomplishment of an *overriding state interest,* and have thus sustained the heavy burden imposed upon them under the equal protection provision of the Fourteenth Amendment.

There remains a further question as to the scope of the classificiation. A validly drawn classification is one "which includes all [and only those] persons who are similarly situated with respect to the purpose of the law." Tussman & tenBroek, *The Equal Protection of the Laws,* 37 Calif. L. Rev. 341, 346 (1949). The classification used by defendants does not include all racial minorities, but only four (Blacks, Chicanos, Indians and Philippine Americans). However, the purpose of the racial classification here is to give special consideration to those racial minority groups which are underrepresented in the law schools and legal profession, and which cannot secure *proportionate representation* if strictly subjected to the standardized mathematical criteria for admission to the law school.

In selecting minority groups for special consideration, the law school sought to identify those groups most in need of help. The chairman of the admissions committee testified that Asian-Americans, *e.g.,* were not treated as minority applicants for admissions purposes since a significant

number could be admitted on the same basis as general applicants. In light of the purpose of the minority admissions policy, the racial classification need not include all racial minority groups.[15] The state may identify and correct the most serious examples of racial imbalance, even though in so doing it does not provide an immediate solution to the entire problem of equal representation within the legal system.

We hold that the minority admissions policy of the law school, and the denial by the law school of admission to plaintiff, violate neither the equal protection clause of the fourteenth amendment to the United States Constitution nor Article 1, § 12 of the Washington State Constitution.[16]

III.

Apart from his equal protection argument, plaintiff contends that the procedures employed by the law school in selecting first-year students constitute arbitrary and capricious administrative action, and that the law school's denial of admission to plaintiff pursuant to these procedures must be set aside.

We recently reaffirmed our long standing test of arbitrary and capricious action:

> Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of facts or circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

DuPont-Fort Lewis School Dist. 7 v. Bruno, 79 Wn.2d 736, 739, 489 P.2d 171 (1971). Plaintiff must carry the burden of proof on this issue. *State ex rel. Longview Fire Fighters Union, Local 828 v. Longview*, 65 Wn.2d 568, 572, 399 P.2d 1 (1965).

15. *See* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L.J. 699, 750 (1971).

16. As we have held, the equal protection clause of U.S. Const., amend. 14, and the privileges and immunities clause of Const. art. 1, § 12, have the same import, and we apply them as one. *Markham Adv. Co. v. State*, 73 Wn.2d 405, 427, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

In determining whether the denial of plaintiff's application to the law school constitutes arbitrary and capricious action, we turn first to the ultimate admissions goals of the law school, pursuant to which the policy and procedures of the admissions committee have been formulated. In light of the tremendous increase in the number of qualified applicants, the law school sought to identify applicants with the potential for outstanding performance in the law school, and then "to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large." The guide for applicants also stated that the criteria to be applied by the law school in the selection process would not be limited to numerical indicators such as test scores and grade point averages, but would also include several other factors requiring the exercise of judgmental evaluation. Among these other factors were recommendations, the quality of work in difficult analytical seminars and writing programs, the academic standards of the applicant's undergraduate school, and the nature of the applicant's graduate work or employment (if any) since graduation. The guide added that race would be considered as one factor in the law school's attempt to convert formal credentials into realistic predictions.

Plaintiff first contends that no standards were applied by the committee in its evaluation of these criteria for admission. However, the trial court specifically refused to make a finding of fact proposed by plaintiff that:

> [T]he Admissions Committee selected and denied students for admission to the University of Washington School of Law with no set standards or procedures.

We particularly note that while race was a major factor, it was not the only factor considered by the committee in reviewing minority applicants. No minority quota was established; rather, a reasonable representation of such groups in the law school was sought. Also, the dean of the law school testified (and the trial court did not find otherwise) that only "qualified" minority applicants were admitted—*i.e.*, minority persons whose entire record showed the committee that they were capable of successfully completing the law school program. Many minority applicants

were denied admission. The trial court did find that some minority students admitted would have been summarily denied had they been white, since their predicted first-year averages were relatively low. Also, the court found that some minority students were admitted with "lower qualifications" than plaintiff. Thus, the record overwhelmingly indicates that the admissions committee did employ predetermined standards and procedures in selecting students.

Plaintiff further contends that the committee failed to consider all applicants on the same basis, but instead judged minority applicants by different standards. In reviewing the files of applicants, the committee did ask the same fundamental question in every case: what is the relative probability of the individual succeeding in law school and making significant contributions to law school classes and the community at large? However, minority applicants were directly compared to one another under this test, but were not compared to nonminority applicants.

The question thus raised is whether, in selecting those applicants most likely to make significant contributions to law school classes and to the community at large, it is arbitrary and capricious for the admissions committee to consider race as a factor in admitting qualified minority applicants whose strict academic credentials yield a lower PFYA than that of some nonminority applicants who are not admitted. The answer depends on whether race is relevant to the goals of the law school's admissions program as stated in the guide for applicants.

The thrust of plaintiff's objection here is that the action of the committee was arbitrary because, in admitting students, it deviated from the relative numerical ranking provided by the PFYAs. Thus, argues plaintiff, by taking subjective [*i.e.*, nonmathematical] factors into consideration, and weighing them differently for different applicants, the committee arbitrarily denied him admission. We do not agree that the exercise of judgment in evaluating an applicant's file constitutes arbitrary and capricious action. Nor do we find an abuse of that judgment here.

The President of the University testified that the decision to consider race in interpreting a minority applicant's numerical grade averages and test scores was reached be-

cause of the opinion within the University that such standardized indicators inherently exclude a disproportionate number of minority applicants.

> [We] recognize the conventional standards that have been used with regard to most students are even less reliable in dealing with students who come from culturally deprived backgrounds. I do not think this means reducing the standards. It admits that the conventional standards are not good indicators and that something more is needed.
>
> . . .
>
> . . . by paying more attention to evidence obtained by the background of the individual and from all kinds of evidence that could be adduced . . . the judgment could be made as to whether or not this particular individual seemed to have greater potential than would be indicated if they were to rely entirely on the mechanical standards.

"Basic intelligence must have the means of articulation to manifest itself fairly in a testing process." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). We express no opinion as to whether the LSAT bears a cultural bias which renders the test less reliable as a predictor of law school performance for minority students than for others. But this is certainly a factor which the law school may consider in its discretion. *See Hobson v. Hansen, supra,* at page 484; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U Tol. L. Rev. [illegible], 203 (1970). It would be unnecessary, of course, for the law school to consider race in interpreting the standardized numerical indicators for nonminority students, because the alleged bias operates *in favor* of those applicants.

The fallacy of plaintiff's argument is the assumption that, but for the special consideration given minority applicants, selection decisions by the committee would have been based solely upon objective, measurable mathematical projections of the academic performance of applicants. Actually, although the PFYA was a very important factor, it was not the sole determinative factor for any group of students. Rather, the committee utilized the PFYA as a starting point

in making its judgment as to the fundamental criterion for admission: the applicant's potential for contributing to law school classes and to the community. That the committee considered more than the standardized numerical indicators in reviewing the files of all students is indicated by the fact that 16 *non*minority, general applicants were admitted with lower PFYAs than plaintiff.

Moreover, we question the assumption that a minority applicant is ipso facto "less qualified" than a nonminority applicant who has a higher predicted first-year average. When judging "qualifications," the primary criterion of the law school in admitting students must be remembered. In light of the gross underrepresentation of minorities in the legal system, can it be said with such certainty as to leave no room for differing opinions that a white applicant with a higher PFYA will make a greater contribution to the law school and the community? We think not.While the probability of applicant achieving high grades in his first year of law school is an important criterion for admission, it is not the sole permissible criterion.

Where the criteria for admissions are not arbitrary and capricious, we will not vitiate the judgment of the admissions committee unless a constitutional violation is shown. Considering the debatable nature of the criteria, we do not find the consideration of race in the admission of those minority applicants who indicate competence to successfully complete the law school program to be arbitrary and capricious. Law school admissions need not become a game of numbers; the process should remain sensitive and flexible, with room for informed judgment in interpreting mechanical indicators. The committee may consider the racial or ethnic background of an applicant when interpreting his standardized grades and test scores.

As a final point, plaintiff argues that the consideration of race here was arbitrary because no inquiry was made into the background of each minority applicant to make certain that the individual was in fact educationally, economically and culturally deprived. However, the mere fact that a minority applicant comes from a relatively more affluent home does not mean that he has not been subjected to psychological harm through discrimination. *See Hobson v.*

Hansen, supra, at page 482. Likewise, every minority lawyer is critically needed, whether he be rich or poor. A showing of actual deprivation is unnecesary for the accomplishment of the compelling state interests here.[17]

Plaintiff has failed to show that the policy and procedures of the law school in denying him admission were so unreasoned and in disregard of the facts and circumstances as to constitute arbitrary and capricious action.

IV.

Plaintiff also contends that Article 9, § 1 of the Washington State Constitution[18] and certain of the statutes governing the University of Washington[19] require preference to be given Washington residents over nonresidents in admission to the school of law, and that in failing to give this preference to plaintiff, the law school wrongfully denied him admission. The trial court ruled against plaintiff's contention on this issue. We agree with the trial court.

Article 9 does not apply to the University of Washington, *Litchman v. Shannon,* 90 Wash. 186, 155 P. 783 (1916), but is addressed only to the "common schools." (Article 9, § 2). *See, e.g., Edmonds School Dist. 15 v. Mountlake Terrace,* 77 Wn.2d 609, 611, 465 P.2d 177 (1970); *Newman v. Schlarb,* 184 Wash. 147, 152-54, 50 P.2d 36 (1935); *State ex rel. School Dist. 37 v. Clark County,* 177 Wash. 314, 321, 31 P.2d 897 (1934); *Litchman v. Shannon, supra,* at page 191. Thus, Article 9 does not call for preferential admission treatment of residents over nonresidents at the law school.

Nor do the statutory provisions cited by plaintiff dictate the contrary. Although these provisions differentiate residents from nonresidents for various purposes (such as qualifying for state aid, RCW 28B.10.800) they cannot be read for the sweeping purpose desired by plaintiff. The only preferential treatment clearly stated is in RCW

17. *See generally* O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education, supra,* at 751.

18. Art. 9 § 1 PREAMBLE It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . .

19. RCW 28B.20.020, 28B.15.011, *et seq.,* and 28B.10.800.

28B.15.200, in which the legislature has prescribed a higher fee for nonresidents than residents for enrollment at the University of Washington. This fee undoubtedly affects the ratio of nonresidents to residents actually enrolled within the law school.[20] However, this fee provision is the only statutory indication of preference; any further limitations upon the admission of nonresidents to the law school are controlled by the Board of Regents, who shall "Establish entrance requirements for students seeking admission to the University." RCW 28B.20.130(3). We hold that the University is not required to give admission preference to residents of the state of Washington.

The judgment of the trial court is reversed.

The foregoing opinion was prepared by Justice Marshall A. Neill while a member of this court. It is adopted by the undersigned as the opinion of the court.

FINLEY, J.
HAMILTON, J.
STAFFORD, J.
WRIGHT, J.
LYTTLE, J., Pro Tem
UTTER, J.

20. Out of the 275 students admitted to the law school's first year class for the 1971-72 school year, 127 were nonresidents. However, only 32 nonresidents (21.6 per cent of the entering class) actually enrolled. As the trial court noted, this high attrition rate (74.8 per cent) tends to indicate that the substantially higher fees for nonresidents significantly affect the percentage of nonresident students in the law school.

WRIGHT, J. (concurring)—I have signed the majority opinion because I agree with the result. A law school admissions program should not and need not be based upon purely mathematical factors.

In many human activities and particularly in the activities of every branch and level of government there must be a careful balancing to insure on the one hand impartiality, honesty and integrity and on the other hand reasonable exercise of discretion and judgment.

In the case of law school admissions, the problem is highly complex for several reasons. We are here concerned with the academic year starting in the fall of 1971. For that year, it was possible to admit into the first year class of the law school not more than 150 students. There were 1,601 applicants, most of whom were qualified and could have been admitted except for the need to limit the size of the class.

Of course, the easy way would be to devise a purely mathematical formula for admissions and then apply it inflexibly. That, however, might not produce the best results. It is a matter in which the administration of the university and of the law school should exercise some discretion. Certainly there is enough intelligence, experience and common sense within the admissions committee to properly exercise its discretion.

My primary reason for writing this brief concurring opinion is to point out the desirability of more complete published standards for admission. The publication of such standards would insure not only the complete fairness of the process, but also the appearance of fairness.

/s/ WRIGHT, J.

I concur
/s/ FINLEY, J.
/s/ STAFFORD, J.

No. 42198

HALE, C.J. (dissenting)—Racial bigotry, prejudice and intolerance will never be ended by exalting the political rights of one group or class over that of another. The circle of inequality cannot be broken by shifting the inequities from one man to his neighbor. To aggrandize the first will, to the extent of the aggrandizement, diminish the latter. There is no remedy at law except to abolish all class distinctions heretofore existing in law. For that reason, the constitutions are, and ever ought to be, color blind. Now the court says it would hold the constitutions color conscious that they may stay color blind. I do not see how they can be both color blind and color conscious at the same time toward the same persons and on the same issues, so I dissent.

The court, as I see it, upholds palpably, discriminatory law school admission practices of the state university mainly because they were initiated for the laudable purpose of enhancing the opportunities of members of what are described as "ethnic minorities." It thus suggests a new rule of constitutional interpretation to be applied here that, if the administrative intentions are adequately noble in purpose, Mr. DeFunis may be deprived of equal protection of the laws and certain special immunities and privileges may be granted to others which, on the same terms, are denied to him. One should keep in mind the wisdom of the old saying that the road to perdition is paved with good intentions.

The court holds that the university law school may give preferential treatment to persons who come from groups "which have been historically suppressed by encouraging their enrollment within the various programs offered at the University." But what seems to me to be a flagrant departure from the constitutions, ignored by the court, is epitomized in the statement that the admission policy was adopted by the law school "to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system." This assertion confesses to prior racial discrimination which I doubt existed,

and fails to recognize, in a case where the demand for seats in the law school is much greater than the school's capacity, that the increased minority participation assured by such admission procedures inevitably produces a correlative denial of access to nonminority applicants.

Thus, in keeping with what may be described as the expanding horizons of latter-day constitutional principles in perpetual processes of invention and assertion, the court discovers in an administrative agency of the state the power to determine, first, who, among the applicants, shall be classified as Black Americans, Chicano Americans, American Indians and Philippine Americans and, then, a concomitant power to exclude all other ethnic minorities, including Asian Americans, from the preferred classification. It lets the agency grant preferences—or as they more accurately should be described, indulgences—accordingly. For reasons not clear in the record, Asian Americans and all others of different ethnic derivation than those enumerated are not included among those to receive such preferences or indulgences.

Parenthetically, the record reveals, to me at least, another invidious form of discrimination—that against the residents of this state. According to some members of the admissions committee, the school has a goal to become a "national" law school, that is, one of nationally recognized prestige and purpose. In pursuance of this goal, the committee declines to discriminate against residents of other states and foreign countries. It is something of a mystery, however, how that goal can be achieved by the substantial lowering of academic standards for admission. In trying to create a national law school by means of procedures now in vogue, the law school must inevitably indulge in what might be deemed an inverse form of discrimination against bona fide residents of the state because the policies of admission operate to deny to residents of the state those preferences which are due them. The admissions committee gives little or no heed to whether the applicant comes from within the state or out of the state and declines to observe an overt policy of affording preference to residents of the state of Washington as required by law and public policy. Although not so intended, the failure to honor that peculiar but logical preference which the university should

accord to the people who live here ipso facto generates an inverse discrimination against them.

When one considers the numerical ratio of nonresidents to state residents in a nation as large as ours, this practice, if maintained over a period of years, while conceivably operating to transform the law school into a national law school, may, except for purposes of providing the tax money to keep it operating, keep it from functioning as a state university. Nowhere, constitutional principles aside, can I find that the legislature has ever conferred such sweeping powers upon the administration or faculty of the university. Thus, in admitting out-of-state students with low academic credentials at the expense of residents of this state with high academic records, the law school not only has violated the constitutions but at the same time has both discriminated against the youth of this state and repudiated a fundamental idea that a great university, if it stands for anything at all, must stand for academic excellence.

Mr. DeFunis supported his application for admission with every conceivable evidence of competence except possibly an astrological horoscope. The record shows that his parents had been residents of and taxpayers to the state for about 50 years, and that he had lived here all of his life, graduating from Franklin High School in Seattle. His admission files showed, and the court found as a specific fact, that he had been graduated from the University of Washington with an overall grade average of 3.62 out of a possible 4, and a junior-senior grade point average as calculated by the law school of 3.71, which would be 3.8 if 9 hours of straight A (4) in Latin earned in the first quarter of his junior year during the summer quarter, 1968, were included. Although a straight A in Latin may speak for little in the current techniques for evaluating law school applicants, one can be sure that John Marshall, Oliver Wendell Holmes, John Storey, Benjamin N. Cardozo and John Harlan, along with Thomas Jefferson, Abraham Lincoln and Franklin Delano Roosevelt, would have found it impressive.

Mr. DeFunis was refused enrollment not once but twice by the school of law. He first applied for and was denied

admission to the entering law class in the fall of 1970, but was informed that he had a better chance of being admitted to the beginning law class the next year, in the fall of 1971. During that interval, while waiting for the latter class, he worked nearly 40 hours per week for the Seattle Park Department and at the same time earned 21 hours of straight A in graduate school, receiving also 3 hours of incomplete. His LSAT, or law school aptitude test scores, for tests taken on three separate occasions, were 512 and 566 in 1969, and a quite remarkable 668 in December, 1970. The 668 score placed in the top 7 percent of all law school applicants nationally computed during a 3-year test period. Even if the scores were average, as the testing service suggests should be done, that average of 582, along with his grade average, placed him in the category of those marked for admission. His predicted first-year average (PFYA)—calculated by formula applied to his junior-senior grade point average of 3.71 and his averaged three LSAT scores along with his average writing test score of 61—gave him a predicted score of 76.23. By all standards and requirements of the admission policies openly announced by the law school, he should have been admitted.

The way things worked out, however, the law school failed to apply even its own vague, loose and whimsical admission standards. Of the approximately 155 enrolled in the entering law class in the fall of 1971, 29 had higher PFYAs than Mr. DeFunis, but there were 74, including minority students, with lower PFYAs. Excluding Asians, 18 of the 36 minority students with lower PYYAs than Mr. DeFunis actually did enroll; the other 18 notified of their admission, also with lower PFYAs than plaintiff, for reasons not discernible in the record did not enroll.

Altogether, 275 applicants were given formal notice of acceptance into the class entering in the fall of 1971 and another 55 were put on a waiting list making a total of 330 students who were formally accepted or notified that they probably would be. The reason for giving notice of acceptance to 275 for a class which was limited to 155 is that usually many applicants apply to several schools; others, for one reason or another, are unable or disinclined to enroll. Plaintiff Marc DeFunis, Jr., was neither among

the 275 notified of acceptance nor among those added to the waiting list of 55.

The discriminating action in refusing his admission becomes even more glaring when an overall view is taken of the admission practices. Of the 275 students who were explicitly told they had been accepted to the entering 1971 fall class, 180 had lower junior-senior grade point averages than Plaintiff DeFunis and only 95 had higher. Of 330 accepted for admission, which included those notified of admission and the additional 55 placed on a waiting list, 224 had lower junior-senior grade point averages and only 106 had a better average—and this without allowing for the 9 hours of A in Latin he had received in his junior year. Among the 275 admitted, 44 were minority, *i.e.*, Afro-American, Philippine American, Chicano or American Indian, and of these 44 minority admitted, only 6 had higher academic qualifications than Mr. DeFunis and 38 had lower qualifications. Among these latter admitted students with lower qualifications were some whose college grades and aptitude scores were so low that, had they not been minority students, their applications would have been summarily denied.

Although preference was shown students from the so-called minority groups, no preference whatever was shown on the basis of Washington residency. Of the 275 admitted (excluding the waiting list of 55), 127 were nonresidents—a curious departure from the obvious public policy for which the university was established and has been primarily maintained for over a century, the education of the people of this state. To ignore bona fide state residence appears to be incompatible with the declared policy expressed in Const. art. 9, § 1, that it is the paramount duty of the state to educate children within its borders, as implemented by early legislation (preceding RCW 28B.20.020), that, with limited exceptions, tuition at the university *shall be free to all bona fide residents of the state.* (formerly RCW 28.77.020). Although now by statute the university must charge tuition to state residents (RCW 28B.15.200), this does not alter the obvious long-existing policy of affording preference to residents of this state. This existing statute recognizes this preference in the assessment of higher tuition charges to nonresidents than to residents.

Although the statutes authorize certain discretionary powers in the Board of Regents to admit nonresidents and require disparate tuition fees from both state residents and out-of-state residents, the traditional policy of preference to bona fide residents for admission to the state's institutions of higher learning remains intact. The one idea clearly emerging from the constitution and statutes affecting higher education in the state's own colleges is that the people of the territory and state founded and have since maintained and supported a state university primarily for the benefit of those who live here.

Mr. DeFunis's case presents the curious situation of a state university school of law founded, maintained and operated by the people of this state and deriving most of its subsistence from their taxes and good will, designed to enable them and their children to obtain a professional education which a substantial number of them could not afford were they studying in a private school, inviting the nation at large to compete for seats in the law school, and then not awarding the seats to the winners of the competition. I think it not a narrow provincialism to say that, by and large the major resources of the state university should be devoted to the purpose for which it was created and has been maintained—service not only to mankind at large but additionally and primarily to the people of the commonwealth who founded and perpetually have supported it. Nonresident students should, of course, be admitted, but their numbers ought to be limited and their admission selective and probably based on reciprocal policies of the other states and foreign countries. Admission of out-of-state residents should be in consonance with the principle that a state university exists primarily for the people of the state and secondarily for residents of other states and foreign countries.

The law faculty was, as the court observes, motivated by a laudable purpose—to increase the number of minority students studying law and with the avowed purpose of equalizing opportunities among applicants who come from the lower income and economic groups with those who come from the higher. This policy of ethnic minority selection apparently was not to apply to faculty positions for

the record does not show that any qualified nonminority applicant for the teaching staff was refused nor any faculty member ousted to make room for law teachers with questionable credentials from a minority ethnic group.

In deciding which particular groups should be classified as ethnic minorities, the committee on admissions first made an assumption supported by no evidence whatever, *i.e.*, that all of the accepted minority students except Asian Americans were of a lower economic status than Mr. DeFunis. No comparative investigation or study as to the financial condition or economic background was made to establish the relative economic and cultural condition of the students applying. It was thus categorically assumed that the ethnic minority applicants were, to use the descriptive term current in academic circles, culturally deprived —meaning, one must suppose, that the environmental factors surrounding a minority student and tending to affect his academic achievements were of a lower order than those surrounding white or majority students. This sweeping and unsupported assumption, derived from no real evidence whatever, that all of the admitted minority students were both poor and culturally deprived, supplied the modus vivendi for the scheme of preferences. It ignored the correlative assumption which inevitably had to be made that neither Mr. DeFunis nor any of the nonminority applicants had been equally culturally or economically deprived.

Aside from the questions of equal protection and the granting of special privileges and immunities, there arises from this record a compelling but subsidiary question as to how such bizarre results came about. How, under any rational admissions policy, could an outstanding student, one of superb academic achievement, be denied admission to his state university law school while others, some of them nonresidents and of mediocre academic standing, were admitted? Did the legislative or the executive branches of government ever delegate authority to handle admission of a state university law school in this fashion? Following is a brief description of the admission procedures as shown by this record.

The admissions practices which operated to deny Mr. DeFunis's application were developed by the law faculty

under the claimed authority of the Board of Regents and the President of the university. An admissions and readmissions committee consisting of five members of the faculty and, for reasons not made clear in the record, two law students, had been established by the dean and a majority of the law faculty to decide who would be admitted. Although each of the two law student members possessed full voting powers and served with exactly the same authority as each of the five faculty members, the record is devoid of any standards applied as basis for their appointment to committee on admissions.

For example, Tama Zorn, one of the student members who testified, said that she had become a member during her first year in law school. Although actually a resident of Washington, D.C., she had been accorded what she described as resident status for tuition purposes on entering law school. She had not been selected for appointment to the committe on admissions or readmissions by the faculty, the regents or the President of the university, but, rather, had been delegated to it by an entity called the Student Bar Association. Her appointment to the committee on admissions and readmissions was based on little more than her application to that organization. In this fashion, the Student Bar Association appointed the two student members to the committee largely upon their request with little or no thought to their qualifications and less as to their purpose, and with no indication in this record that the Student Bar Association itself possessed any particular talents or qualifications to pass in turn upon the qualifications of its incoming fellow students.

Mrs. Zorn said that the admission committee members had no personal acquaintance with the applicants; that her knowledge of the applicants' aptitudes and qualifications had to be derived exclusively from their application files and the decisions reached from a "policy that intends to encourage minority students to come to law school and practice law in the community." Minority students could readily be identified from the files of the applications but one could not tell whether they were economically underprivileged or, as the term is used, culturally deprived. She did acknowledge, however, that Asian Americans, although a minority, were given no preferential treatment.

In devising the modus operandi for carrying out the policy of preferential treatment, little thought was given to the possibility that, in addition to being suspect constitutionally, the practice might well be ultra vires for it placed a controlling power over the careers and even the lives of many potential students in the hands of their fellow students.

The two law student members of the committee each exercised an initial and virtually controlling vote in the screening of about 60 or 70 applicants. Each member of the committee, including student members, was given approximately 70 files upon which to make recommendation for admission or rejection, with instructions that only about 10 were to be approved for admission and the remaining 60 rejected. Thus, of over 1500 files to be examined, 490 files were distributed among the committee members. Each member would arrive at what was determined to be a cutoff point below which the files would be summarily rejected, and in the usual course of events those files received no further consideration.

Of the approximately 70 files given to each member, both student and faculty accordingly would return to the whole committee a recommendation of 10 for admission. Since the 70 files per committee member represented only 490 of some 1500 plus, Mrs. Zorn testified she assumed that several hundred applicants had been summarily rejected before distribution of the 70 files to each member, and quite possibly some had been summarily admitted. In general, it is a fair summary of the record, I think, that of the approximately 70 files distributed to each committee member, an applicant neither included in the 10 recommended nor in some 20 more carried as secondary possibilities had little or no chance for admission.

Thus, some 40 student applicants were categorically rejected, another 20 given only secondary or uncertain chances, and 10 applicants put in a categorically positive position for admission upon nothing more than the recommendation of a first- or second-year law student. Mrs. Zorn testified that of the 40 files marked by her for rejection, she had no subsequent knowledge or further contact.

As far as she knew, they were consigned thenceforth to bureaucratic oblivion.

After reviewing Mr. DeFunis's file prior to trial, Mrs. Zorn said that it indicated nothing derogatory, but, as she expressed it, showed something perhaps negative. This vague or perhaps negative feeling she derived, as she testified, from the following comment contained in his file, appearing in one of the recommendations supplied on Mr. DeFunis's behalf:

> "This guy is a person I would refer to as the planner. He sets his goal and steadily works toward it, come Hell or high water. I admire him in his persistence, but there seems to be the slight tendency of not caring upon whom he might step in the process. I have known him for four years and as an adviser for three quarters, and as a student in one of my classes. His major is in political science but with strong —." Well, I can't read the next word, "in history and sociology. His hobbies are sports, classical music collection and classical guitar. He has helped finance his education by sales work, book store and Seattle Park Department laborer. His activities are campers—" THE COURT: Campus. MR. DIAMOND: "—on campus have been largely political oriented, mobile, model congress and mock political convention. He wishes to practice law. I recommend."

The negative qualities of these file comments are, indeed, hard to identify, but for some reason or other Mrs. Zorn thought them to be unfavorable and said that they contributed to warranting a rejection. She conceded, however, that Mr. DeFunis's LSAT score was higher than the scores of many she recommended for acceptance.

There is also a curious aura of civil, political or community "activism," as it is sometimes called, surrounding the recommendations for admission or rejection. One student applicant recommended by Mrs. Zorn had an LSAT of 562, substantially lower than the average of Mr. DeFunis, but was recommended for the waiting list because of being very active on campus and in his community. The activity which impressed her the most was that he was a founding member of Isla Vista Branch of the American Civil Liberties Union and president of its student chapter at the Uni-

versity of California, Santa Barbara. He had participated in the John Tunney for Senate campaign in California and in the operation of a student owned and operated radio station in Santa Barbara. Also, the applicant had been a campus news reporter and a member of several other campus organizations. Mrs. Zorn had concluded that these activities, despite the low LSAT, established sound basis for admission to the law school. She recommended, however against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington.

Another student member of the admissions committee, Mr. Hayes, testified he had been put on the committee during his first year of law school but left it because of poor grades. As he explained his departure, "I just barely made it to the second year." Like Mrs. Zorn, Mr. Hayes was given a stack of files to review, but, because of his part-time work, he reviewed substantially fewer files than did the other members of the committee. He said he had had no special training with respect to judging or passing upon applicants to the university law school and had been put on the committee simply by adding his name to a sign-up sheet from which the Student Bar Association had then picked him. Testifying concerning one applicant whose junior-senior grade point average was only 2.89, a comparatively low grade, he acknowledged, that applicant's file cover contained the statement entered by a committee member, "We seem to have bungled this one pretty conclusively. He's got us." The committee, having mistakenly accepted that applicant, he said, did not rectify the error and the particular applicant remained admitted.

The committee, he said, was trying to achieve what he described as a class balance based on an estimated potential for getting through school. He said most of the files given him for review were those of minority students. Another applicant he recommended for admission had a junior-senior grade point average of only 2.63 with the

notation, "Excellent recommendations, sound record. Divorced with five kids. Could make it if her personal situation could be worked out, lightened load possibility? Admit."

Another student member, Mrs. Rochelle Kleinberg, was put on the admissions committee during her second year of law school. She was appointed, she said, by the Student Bar Association as was Mrs. Zorn simply by putting her name on a posted sign-up sheet. When asked why she had sought the appointment, she said that she thought it had an important role in the law school and wished to participate. As it turned out, the role was in fact extremely important for the future of many highly qualified student applicants.

Mrs. Kleinberg, as did most of the others, initially received about 70 files for review and eliminated 50 or 60 of them below what she deemed an appropriate cutoff point. Thus, the rejected applicants had no way of knowing that their opportunities for admission had been summarily curtailed by the simple act of rejection done by a law student engaged in the initial review of some 70 files.

A random examination of the records of various students accepted by the law school in the entering classes for which Mr. DeFunis had applied shows extraordinary and inexplicable variations in their qualifications. One admitted applicant showed an almost vertical academic climb. He had a junior-senior grade point average of 3.64, but an overall grade point average of 2.85. The admission committee notes in his file read as follows: "Overall GPA 2.85. strange recommend. 'arrogant, conceited" but apparently bright . . . [not readable] Take a chance on his screwy personality and admit." His PFYA was 78.35 with a writing score of 71. One cannot discern from the files whether a heightened community or campus activity, or whatever, constituted the determining factor for admission. One young woman with a junior senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council.

An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected. Another applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his "recommendations are equivocal and his academic career unimpressive." The admissions council deemed unimpressive a 3.32 junior-senior average earned in chemistry, physics, analytical geometry, calculus and general physics laboratory. This particular applicant with the so-called unimpressive academic record had also earned 6 hours of A in advanced calculus, 6 hours of A in mechanics and an A in introduction to digital computers.

Another young woman, earlier alluded to, was admitted to the law school with a junior-senior grade point average of 2.63, an LSAT of 481, and a writing score of 55. The file shows that she was 35 years of age at the time of admission and would thus be 38 upon graduation, if indeed able to complete the program on schedule. The remarks entered by the admissions council in her file note that she was "Divorced with five kinds. Could make it if her personal situation could be worked out." It added, "Excellent recommendations; sound record," and upon these conclusions recommended admission to the law school.

By letter of March 2, 1971, an applicant with a junior-senior grade point average of 2.89, an LSAT of 663 and a writing score of 58 was accepted. Other than pointing out that the applicant was a member of a minority, the admissions council was noncommittal.

Another applicant admitted with a junior-senior grade point average of 3.56 had an LSAT of 625. Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: "Enthusiastic recommendation. Abundant community action projects."

Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his

acceptance by letter September 14, 1971, by the dean of the law school. There is apparently very slight correlation in many cases among the GPA, the LSAT, and the writing scores.

An applicant with a GPA of 3.55 was notified of his acceptance by the law school by letter of May 21, 1971, from the associate dean after achieving an LSAT of 625 and a writing score of 61. For some reason or other, the admissions committee recommended against outright admission but that he be placed on the waiting list. Despite this, however, the applicant was categorically admitted.

Of the approximately 150 students actually enrolled in the class for which Petitioner DeFunis made his application, only some 42 admission files were placed in evidence. But an inspection of these files, in my judgment, fails to show any consistent policy on admissions at which a pre-law student could aim his career. If he is intelligent, works hard, and achieves high grades, his place in the law school class may be preempted by someone with lesser grades but who is engaged in what is described as "community activities," or is otherwise described as a student activist. Or, if he is engaged in community activities and still attains high grades through diligence and intelligence and long hours at the books, his position may be taken in the entering class by one who has neither engaged in "community activity" nor achieved high grades but, nevertheless, has made a high LSAT score. Or, even if he studied hard, is intelligent, and placed high in grades, LSAT and PFYA, and engaged in what are called community activities, his place might still be awarded to a minority student who has done none of these. All of these inequities are, I fear, bound to foster a spirit of anti-intellectualism in the heart of what should be an intellectual center.

The discriminatory character of the admissions policy is, I think, well epitomized by the trial court in its oral decision:

> The applications of the black students were separated from all others and assigned for review to a black student and a professor who had worked closely with the CLEO Program.

> Some minority student were admitted whose college grades and aptitude test scores were so low that had they been whites their applications would have been summarily denied. Excluding the Asians, only one minority student out of 31 admitted among the applicants had a predicted first year average above the plaintiff's.
>
> Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified.

This method of selection operated to deprive Mr. DeFunis of his position in the entering law classes both in 1970 and again in 1971. Not being a member of a preferred ethnic minority, he found his place taken by others who not only possessed far lower credentials and qualifications but among whom were some who on the face of their records were unqualified. He was the victim of what in current parlance has come to be described as "affirmative action," which includes preferential treatment for the sake of creating a more equitable racial balance—a process which the court now finds constitutional.

If this be constitutional, then, of course, the constitutions are not color blind; one racial group may be given political or economic preferment over another solely because of race or ethnic origin. Yet, this was the very thing that the Fourteenth Amendment was designed to prevent. All races, and all individuals, are entitled to equal opportunity to enter the law school. To admit some solely because of race or ethnic origin is to deny others that privilege solely for the same reasons, which in law amounts to a denial of equal protection to the one while granting special privileges and immunities to the other.

The United States District Court, Northern District of California, recently stated what I perceive to be the controlling principle here when it said in its findings of fact in *Anderson v. San Francisco Unified School Dist.*, ... F. Supp. ..... (N.D. Cal. 1972):

> No one race or ethnic group should ever be accorded preferential treatment over another. No race or ethnic group should ever be granted privileges or

prerogatives not given to every other race. There is no place for race or ethnic groupings in America. Only in individual accomplishment can equality be achieved.

With the possible exception of administering justice, I accept the dicta in *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), that education is probably the most important function of state and local government. It should not be forgotten, however, that in striking down decisively the separate but equal concept of segregated schools, the rationale of that decision rested on equality of opportunity and the premise that segregation based on race or color amounted categorically to an unconstitutional denial of that equality. In speaking of equality of educational opportunity, the court there said, "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U.S., at page 493.

The mainstream of current constitutional law runs forthrightly against the discriminatory practice of preferential treatment based on race, color, or ethnic origin. In *McLaughlin v. Florida*, 379 U.S. 184, 13 L. Ed. 2d 222, 85 S. Ct. 283 (1964), an adultery statute imposing greater penalties when the participants were of different races was held unconstitutional under the Fourteenth Amendment. Despite the wide legislative judgment to be sustained in determining whether an act is reasonably designed to attack the evil aimed at, any classification based upon race must, it was held, be suspect at the outset on the general rule that the constitution and amendments were intended to eliminate all racial discrimination arising from official actions. *Bolling v. Sharpe*, 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

As pointed out in *McLaughlin v. Florida, supra*, racial classification has been held invalid in many cases: race was required to be designated in voting and property records (*Virginia State Board of Elections v. Hamm*, 379 U.S. 19, 13 L. Ed. 2d 91, 85 S. Ct. 157 (1964)); designation of race on nomination papers and ballots (*Anderson v. Martin*, 375 U.S. 399, 11 L. Ed. 2d 430, 84 S. Ct. 454 (1964)); racial segregation in public parks and playgrounds (*Wat-*

son v. Memphis, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963)); segregation in the public schools (*Brown v. Board of Education*, 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 and 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954)); segregation of the races in public transportation (*Gayle v. Browder*, 352 U.S. 903, 1 L. Ed. 2d 114, 77 S. Ct. 145 (1956)); and as a social practice even without sanction of ordinance or statute in public restaurants (*Lombard v. Louisiana*, 373 U.S. 267, 10 L. Ed. 2d 338, 83 S. Ct. 1122 (1963)); and in public swimming areas. *Baltimore v. Dawson*, 350 U.S. 877, 100 L. Ed. 774, 76 S. Ct. 133 (1955). All were held repugnant to the constitution. If the Fourteenth Amendment stands for anything at all, it should be clear from these decisions that it stands for the principle that all discrimination based on race, religion, creed, color or ethnic background by any state, its constitutions, its subdivisions, or its agencies, is prohibited.

The majority concedes and the record is indisputable that Petitioner DeFunis was ousted from the list of acceptable students solely because of preference accorded others, and that this preference was granted to many solely because of race and ethnic origin. Even though there are many areas of public endeavor where it would be deemed a valid and constitutional exercise of the police power to provide special assistance for those segments of our population described as disadvantaged or poor, or culturally deprived, such special assistance could not constitutionally deprive Mr. DeFunis of a seat in the law school and award it to a member of a group whose existence is defined or controlled by considerations of race or ethnic origin. When the seat in the law school is awarded on the basis of race or ethnic origin, the procedure necessarily falls within the constitutional principles prohibiting racial segregation or preference.

In referring to special aid and assistance, the fact remains that the committee on admissions and readmissions made no investigation whatever as to whether any of the minority students admitted were poorer, more disadvantaged or more culturally deprived than some of the students of higher educational and aptitude qualifications who had been turned down. The committee simply applied a theory and ipso facto assumed that every Black Ameri-

can, Indian American or Chicano, or Philippine American, because of his ethnic origin of necessity had to be more disadvantaged, poorer and more culturally deprived than those of Asian, Caucasian, or other ethnic origin.

The case of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 20 L. Ed. 2d 1189, 88 S. Ct. 2186 (1968), sustaining an act of Congress which prohibited racial discrimination against Blacks in occupying or purchasing federally aided housing, in my view, supports rather than disparages DeFunis's position and does not, I think, purport to find the constitution color conscious. There the court held that the Congress had constitutional power to prevent the expenditure of public funds for the enhancement of one racial group to the detriment of other racial groups. It held that, where state law affords preference on the basis of race so that it works a detriment to others on the basis of race, the law and regulation pursuant to it are inevitably repugnant to the Fourteenth Amendment.

This means that this court's decision in *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 492 P.2d 536 (1972), would tend to sustain DeFunis's position in the present case. There is no more than a coincidental parallel between the *Mandatory Bussing* case and Mr. DeFunis's case. There we sustained a modest program of compulsory bussing initiated by the Seattle school district for the stated purpose of assuring higher quality of education for all students of whatever racial, religious or ethnic background. The policy of required bussing has been adopted because the school board was of the opinion that racially segregated schools, even those where the segregation is de facto and not de jure, are inferior to integrated schools, and that a racially segregated student body will receive an education inferior to that of a racially integrated student body. This court held that the school board was acting within its lawful powers in reaching this conclusion and in implementing its views by a program of mandatory bussing. In the *Mandatory Bussing* case, the Seattle School board did no more than act officially upon conclusions it had the authority to reach, and provide for racially integrated education while curtailing de facto segregation.

There is no genuine parallel between Mr. DeFunis's

case and the case of the children required to ride the busses. There, we were dealing with a procedurally sound administrative determination that every child, under the plan and the constitution, would gain an integrated and thereby superior education at the expense of no other child. Providing one child with a better, *i.e.*, integrated, education did not operate to deprive another of an equal, integrated education. Benefit to one would not be at the expense of another. Putting one child on a bus to ride to school did not operate to take away another's seat in the classroom. Ordering bussing to eliminate segregated schools was no less compatible with the constitutions than the idea that children needing or requesting specialized training may have to ride busses to special schools because every department and facility of a school system, in the nature of things, cannot be equidistant from all children. In the *Mandatory* Bussing case, the Seattle school board was attempting to discharge its constitutional duty of providing equality of educational opportunity for all children within the district at the expense of no child or children.

Here we have precisely the opposite. Putting some applicants into the classroom deprived a qualified applicant of his seat there. It operated to deprive him thereby of the equal protection of the laws and at the same time granted to others privileges and immunities not available to him on equal terms. Thus, aside from the patently arbitrary and capricious method earlier delineated, by which Mr. DeFunis's position was given to a less qualified applicant, his ouster fell explicitly within the constitutional principle that education must be provided to all students on equal terms and all public education programs must be conducted without regard to race, color or national origin. *Kemp v. Beasley*, 352 F.2d 14 (8th Cir. 1965).

Are there methods by which a state owned and operated law school may be fairly and constitutionally administered so as to comport with the constitutions? Although the courts have neither the power nor the aptitude to operate a university and should be without the inclination to do so, several possible methods come to mind which prima facie, at least, meet the fairness and equal protection standards of the constitutions. One would be a system of comprehensive competitive examinations in predesignated courses such as

English, history, basic science, mathematics, economics and sociology, and with optional courses in other fields selected by the student.

Another method would be to work out a reasonably accurate mathematical correlation between grade values from different colleges or universities in preannounced prelaw courses and to compute those equivalent grades with admission granted the 150 students with the highest grades. This gives every student a fair chance to achieve his ambition.

Another possible solution—in case the faculty believes that high prelaw grades should not be the main criterion—prescribe a sound but not extraordinarily high prelaw grade standard and make a random selection by lot and chance of the 275 applicants to be admitted from among those qualifying. And the fairest way of all—but I doubt its efficacy—admit all applicants possessing a minimum prerequisite grade point in prescribed courses, conduct the law classes in the field house or stadium, if necessary, give frequent examinations, and let the better qualified few survive on the basis of their grades in law school. There are, of course, other methods equally fair and impartial which may be readily developed, all of which will meet the constitutional tests of fair and impartial application. But whatever scheme is developed, one thing is certain: Keep it within the principles of the constitutions, no one can be preferred and no one can be disparaged because of race, color, creed, ethnic origin or domestic environment.

If it is the state policy—and I think it should be—to afford special training, guidance and coaching to those students whose domestic environment has deprived them of a fair chance to compete, or to provide financial assistance to students in economic straits, it is within the state's constitutional powers to do so, but once these students have reached the point of seeking admission to a professional or graduate school, no preference or partiality can or should, under the constitutions, be shown them.

The rationale of *Anderson v. San Francisco Unified School Dist.*, ... F. Supp. ..... (N.D. Cal. 1972), an opinion dated October 30, 1972, filed in the United States

District Court, Northern District of California, I think, expresses the principles which should govern the *DeFunis* case. That court held unconstitutional a school district's plan to give preference in employment and promotions to members of ethnic minorities in administrative and supervisory positions, such as principals, assistant principals, deans and heads of departments—a plan designed to increase the numerical representation of ethnic minorities in the administration of the schools. That court, in holding the scheme unconstitutional, said that "The key issue in this case is whether or not a classification which is based on race is valid," and answered it with a statement of principles which ought to control here:

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?

Mr. DeFunis came before the bar of the Superior Court much as did petitioners, parents of school children, in *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), asking that he not be denied admission to the university law school because of race or ethnic origin. The trial court properly ordered his admission. So, too, would I, and, therefore, I would affirm.

/s/ HALE, C.J.

I concur,
/s/ HUNTER, J.

NO. 42198

HUNTER, J. (dissenting)—The majority supports a laudable purpose—to enable students of certain minority races to enter the University of Washington School of Law in order that ultimately there will be a greater representation of practicing lawyers of those races in the legal profession —with which purpose I do not disagree. This must not be accomplished, however, by clear and willful discrimination against students of other races as the Admissions Committee of the University of Washington School of Law has done in this case by denying admission to the respondent, Marco De Funis, Jr., to this school, as found by the trial court and amply supported by the record.

This action by the Admissions Committee of the School of Law constitutes arbitrary and capricious action, flaunting the guarantees of the equal protection provisions to all citizens as provided in our state and federal constitutions.

The line of federal cases cited by the majority are not in point. They stand for the proposition that full opportunity for education be afforded to students of all races; whereas, the present case denies the opportunity of education to students of one race to make room for students of other races and with lesser qualifications.

I would affirm the trial court, directing the Admissions Committee to admit the respondent, Marco De Funis, Jr., to the University of Washington School of Law.

/s/HUNTER, J.

I concur
/s/ HALE, J.

APPENDIX B

SUPERIOR COURT OF WASHINGTON

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR., and LUCIA DE FUNIS, his wife,

Plaintiffs,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT, and RICHARD L. RODDIS, Admissions Committee of University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE V. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Defendants.

No. 741727
Judgment

THIS MATTER having come on regularly for hearing before the Honorable Lloyd Shorett, judge of the Superior Court of King County, sitting without a jury, the plaintiffs being represented by Josef Diamond and Craig S. Sternberg of Lycette, Diamond & Sylvester, and the defendants being represented by Slade Gorton, Attorney General, and James B. Wilson and John Lackland, Assistant Attorneys General for the State of Washington, and the court having heard the testimony of witnesses, having fully considered all of the evidence and records and files herein, and having made and entered its Findings of Fact and Conclusions of Law, it is now, Therefore,

ORDERED, ADJUDGED AND DECREED that the plaintiffs be and hereby are entitled to recover their costs and taxable disbursements herein.

DATED this 18 day of October, 1971.

LLOYD SHORETT

JUDGE

Presented by:

LYCETTE, DIAMOND & SYLVESTER

By JOSEF DIAMOND

Attorneys for Plaintiffs

Copy Received:

JAMES B. WILSON

James B. Wilson
Senior Assistant Attorney General
Chief, University of Washington Division
112 Administration Building
Seattle, Washington 98195
Tel: 543-4150
Of Attorneys for Defendants

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR., and LUCIA DE FUNIS, his wife,

Plaintiffs,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT, and RICHARD L. RODDIS, Admissions Committee of University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE V. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Defendants.

No. 741727
Findings of Fact and Conclusions of Law

THIS MATTER having come on regularly for hearing before the Honorable Lloyd Shorett, judge of the Superior Court of King County, sitting without a jury, the plaintiffs being represented by Josef Diamond and Craig S. Sternberg of Lycette, Diamond & Sylvester, and the defendants being represented by Slade Gorton, Attorney General, and James B. Wilson and John Lackland, Assistant Attorneys General for the state of Washington, and the court having heard the testimony of witnesses, having fully considered all the evidence and records and files herein and having rendered his oral decision, now makes the following

FINDINGS OF FACT

I.

That the plaintiffs Marco DeFunis, Sr. and Betty DeFunis, his wife, are husband and wife, parents of the plaintiff Marco DeFunis, Jr., and are taxpayers and are and have been residents of Seattle, King County, Washington, for approximately fifty years.

II.

That the plaintiffs Marco DeFunis, Jr. and Lucia DeFunis, his wife, are husband and wife, were born in Seattle, and are taxpayers and are and have been residents of King County, Washington, for more than 22 years and are now residents of the city of Bellevue, Washington.

III.

That the plaintiff Marco DeFunis, Jr. is 22 years of age, a graduate of the public elementary schools and of Franklin High School in Seattle, Washington, and was graduated from the University of Washington in June, 1970, with a Bachelor of Arts degree.

IV.

That the plaintiff Marco DeFunis, Jr. graduated from the University of Washington with an overall grade average of 3.62 out of a possible 4.00; a junior-senior year grade point average of 3.71, as calculated by the law school, or 3.8 when you include 9 hours of straight A he received in latin during the first quarter of his junior year in the summer of 1968.

V.

That the plaintiff Marco DeFunis, Jr. was graduated from the University of Washington in June, 1970, Phi Beta Kappa and magna cum laude.

VI.

That Marco DeFunis, Jr. worked part time 20 to 40 hours per week during the school year and at the same time taught Sunday school on weekends.

VII.

The defendants are the University of Washington, an agency of the state of Washington, and the defendant Charles Odegaard is president of the University of Washington. The defendants Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George V. Powell, comprise all of the regents of the University of Washington.

VIII.

That Richard S. L. Roddis is the Dean of the University of Washington School of Law. Richard O. Kummert, Robert S. Hunt, William R. Anderson, Robert L. Fletcher, Geoffrey L. Crooks and Virginia Lyness are professors of law and members of the Admissions Committee of the University of Washington School of Law. Rochelle Kleinberg, at the times material hereto, was a second year law student, and that Tama Zorn and Vincent Hayes, at the times material hereto, were first year law students, and all three were members of the Admission Committee of the University of Washington School of Law.

IX.

The Board of Regents of the University of Washington has delegated through the president to the faculty of the School of Law the power to determine the processes and policies governing admission to the School of Law. Pursuant to this delegation of authority, the faculty has designated an Admissions Committee to determine who shall be admitted to the School of Law. During all times pertinent hereto the Admissions Committee was composed of five faculty members and two students. Faculty members are selected by the Dean and the Committee on Committees, the latter committee being elected by the full faculty. Student members are selected by the Student Bar Association, which is comprised of all the enrolled students in the School of Law.

X.

The University of Washington School of Law received 1601 completed applications for admission to the class be-

ginning September, 1971. Under the University's enrollment limitation there were 445 positions allotted to the School of Law, and of these the number available for the first year class was between 145 and 150 students. Each applicant had earned a baccalaureate degree, had taken the Law School Admission Test, and had completed the application process which included procuring letters of recommendation from a college faculty member and a college dean, as well as, at his option, submitting a personal statement identifying elements in his background and experience that he felt were relevant in considering his application.

XI.

That the plaintiff Marco DeFunis, Jr. applied for admission to the University of Washington School of Law class of 1973, commencing in the fall of 1970, after graduating from the University of Washington in the spring of 1970. He was not accepted, but was placed on the class admissions waiting list and after waiting until late summer of 1970 was finally denied admission to the Law School for the fall term beginning 1970. At that time said plaintiff was advised he might have a better chance of attending Law School with the class entering in the fall of 1971.

XII.

Thereafter, during the academic year 1970-71, the plaintiff Marco DeFunis, Jr. attended graduate school and took 24 hours of graduate school courses, in which, at the time of his application, he had received 21 hours of A and 3 hours of incomplete, while working 36 or more hours per week for the Seattle Park Department.

XIII.

That the plaintiff, Marco DeFunis, Jr., for a second time applied to the University of Washington School of Law for admission in the fall of 1971. Said plaintiff's admissions credentials included, in addition to the high scholastic records achieved as an undergraduate, and his one-year graduate school record as set forth above, Law School Aptitude Test scores of 512 (August, 1969), 566 (November, 1969), and 668 (December, 1970). The score of 668 is within the top 7% of all law school applicants in the nation who have taken the test in the last three years.

XIV.

That the plaintiff Marco DeFunis, Jr. had a Predicted First Year Average, as determined by the Law School for comparison with other candidates of 76.23 and that said plaintiff's Predicted First Year Average was calculated by using a formula combining the said plaintiff's junior-senior year grade point average of 3.71, average L.S.A.T. score of 582 (512 + 566 + 668, divided by three) and average writing test score component of 61 (62 + 58 + 64 divided by three).

XV.

The plaintiff Marco DeFunis, Jr. was for a second time not accepted to the University of Washington Law School, but was placed on the class admission waiting list. He was notified of his final denial of admission on August 2, 1971.

XVI.

The ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of P.F.Y.A.'s. There were 29 applicants who had higher P.F.Y.A.'s than plaintiff's and whose applications were denied; there were 74 applicants (including 36 minority group applicants) who had lower P.F.Y.A.'s than plaintiff's and whose applications were granted. The actual number of said minority group students, excluding Asian-Americans, enrolling in the class was 18.

XVII.

The Admissions Committee sent letters of acceptance to over 200 applicants. Normal attrition among those invited to attend would have reduced this group to produce a class of about 150. Against the possibility of unusually high attrition among the group of selected applicants, the Committee placed approximately 155 additional applicants on a waiting list. That list was ranked in quartiles, there being approximately 46 applicants in the first or highest quartile, 38 applicants in the second quartile, 36 applicants in the third quartile, and 33 applicants in the fourth, or lowest, quartile. The remaining applicants—those receiving neither offers of acceptance nor waiting list assignments—received letters of denial. Plaintiff received an invitation to be placed on the waiting list and he was

ranked in the fourth or lowest quartile. On July 21, 1971, the rate of attrition from the admitted applicants appearing to be within normal ranges, the Committee decided to send letters of denial to those applicants in the third and fourth quartiles on the waiting list. Plaintiff was thus notified on August 2, 1971, that he would not be admitted to the School of Law class beginning September, 1971.

XVIII.

As of August 1, 1971, 275 students were finally admitted to the freshman Law School class and 55 students remained on the waiting list, making a total of 330 students. The plaintiff Marco DeFunis, Jr. was notified at that time that he was neither admitted nor any longer on the waiting list.

XIX.

Out of the 275 students admitted to the Law School, 127 were nonresidents of the state of Washington. Out of the total considered 330 students, 150 were nonresidents of the state of Washington and 180 were residents of the state of Washington. Thirty-two non-residents or 21.6% of the entering class were enrolled in the first year law class.

XX.

Out of the 275 students admitted to Law School, 180 had a lower junior-senior year grade point average than the plaintiff Marco DeFunis, Jr., and 95 had a higher junior-senior year grade point average. Of the total 330 students considered, 224 had a lower junior-senior year grade point average than plaintiff Marco DeFunis, Jr., and 106 of the 330 had a better junior-senior year grade point average. (Using the Law Schools' calculation of the plaintiff Marco DeFunis, Jr.'s junior-senior year grade point average, and not including nine hours of A earned in his junior year.)

XXI.

That the total number of students admitted to the University of Washington School of Law, 44 of these students were "minority" students, i.e., who were Afro-American,

Asian-American, Chicano or American-Indian. Of the total of these "minority" students admitted, 6 had qualifications higher than the plaintiff and 38 had qualifications lower than the plaintiff Marco DeFunis, Jr. (Based on the Law School's calculations.)

XXII.

That the Law School desired to achieve a greater "minority" representation among students enrolled therein. To accomplish this desire the Law School gave a preference to some races, including Afro-Americans, Chicanos and American-Indians. In doing so, the Admissions Committee assumed that all members of minority races, with the exception of Asian-Americans, were deprived persons. The applications of black students were separated from all others and assigned for review to a black student and a professor who worked closely with the CLEO program. The applications of other minority students, except Asian-Americans, were assigned to Professor Hunt. The CLEO program is set up specifically to aid minority and other culturally deprived students both financially and educationally in their admission to law schools and is supervised by law schools.

XXIII.

That some minority students were admitted to the University of Washington School of Law prior to and instead of the plaintiff Marco DeFunis, Jr., with college grades and aptitude test scores so low that had they been white their applications would have been summarily denied.

XXIV.

That since no more than 150 applicants were to be admitted to the University of Washington School of Law, the admission of less qualified students resulted in a denial of places to those better qualified.

XXV.

That the plaintiff Marco DeFunis, Jr. had better qualifications than many of the students admitted by the Law School Admissions Committee and the plaintiff Marco De-

Funis, Jr. was and is fully qualified and capable of attending the University of Washington School of Law satisfactorily.

XXVI.

That there were some students who were admitted in previous years and then went into the Armed Services of the United States, which students were admitted without further examination of credentials, although some of these credentials were lower than the plaintiff's.

XXVII.

That there is at least one place held for the plaintiff Marco DeFunis, Jr. under a temporary restraining order dated August 31, 1971, which order restrained the University of Washington from "admitting applicant students or transfer students to undergraduate law study in the law school of the University of Washington in a number which would preclude the admission of plaintiff, Marco DeFunis, Jr., to the 1971-72 first year class," . . . and said plaintiff has been and is now attending said Law School, subject to the final determination of his case herein.

From the foregoing Findings of Fact, the court now makes the following

CONCLUSIONS OF LAW

I.

That in denying the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law, the University of Washington has discriminated against said plaintiff and has not accorded to him equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

II.

That there is no constitutional restriction upon admitting nonresidential students and no laws or regulations providing that preference shall be given to residential stu-

dents over nonresidential students for admission to the University of Washington School of Law.

III.

That the plaintiff Marco DeFunis, Jr. should be admitted to the University of Washington School of Law for the class of 1974, beginning September 22, 1971, and that the defendants are ordered and directed to admit said plaintiff Marco DeFunis, Jr. into the University of Washington School of Law.

IV.

That the defendants wrongfully denied the plaintiff Marco DeFunis, Jr. admission to the University of Washington School of Law.

V.

That the plaintiffs shall recover their costs and disbursements herein to be taxed.

Done in open court Oct. 18th, 1971.

LLOYD SHORETT
Judge

LYCETTE, DIAMOND & SYLVESTER

By JOSEF DIAMOND
Attorneys for Plaintiffs

Copy Received:

JAMES B. WILSON

James B. Wilson, of
Attorneys for Defendants
Senior Assistant Attorney General
Chief, University of Washington Div.
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Tel: 543-4150

APPENDIX D

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,

Respondents,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT and RICHARD L. RODDIS, Admissions Committee of University of Washington Law School; HAROLD S. SHEFFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT L. PHILIP, and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Appellants.

REMITTITUR
No. 42198

King County
No. 741727

The State of Washington to: The Superior Court of the State of Washington in and for King County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on March 8, 1973, became the final judgment of this court in the above entitled case on May 16, 1973. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 33 on Appeal, costs are taxed as follows: Two thousand three hundred and two and 72/100 dollars (2,302.72) in favor of appellants and against respondents.

The petition for rehearing was denied by order dated May 16, 1973.

cc: Honorable Slade Gorton
Mr. James B. Wilson
Lycette, Diamond & Sylvester
Mr. Josef Diamond (SEAL)
Mr. Lyle L. Iversen
Mr. Craig S. Sternberg
Report of Decisions

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 16th day of May, A.D. 1973.

/s/ WILLIAM M. LOWRY

Clerk of the Supreme Court, State of Washington

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARCO DE FUNIS, *et al.*, *Respondents,* v. CHARLES ODEGAARD, *et al.*, *Appellants.*	No. 42198 Order Denying Petition for Rehearing

The Court having considered the respondents' petition for rehearing herein,

It is ordered that the petition be and it is hereby denied.

Dated this 16th day of May, 1973.

By the Court:

FRANK HALE
Chief Justice

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARCO DE FUNIS and BETTY DE FUNIS, his wife; MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,
Plaintiffs-Appellants,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP, and GEORGE B. POWELL, Regents of the University of Washington, and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

No. 42198

Notice of Appeal to the Supreme Court of the United States or in the Alternative Notice of Application for Writ of Certiorari

I. NOTICE IS HEREBY GIVEN that Marco DeFunis and Betty DeFunis, his wife, and Marco DeFunis, Jr. and Lucia DeFunis, his wife, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of the State of Washington filed March 8, 1973, and Denial of Petition for Rehearing dated May 16, 1973, whereby the Supreme Court of Washington reversed the decision of the Superior Court of the State of Washington for King County entered in this action on the 18th day of October, 1971.

This appeal is taken pursuant to 28 USCA § 1257(2).

II. The Clerk will please prepare a transcript of the Record in this case for transmission to the Clerk of the Supreme Court of the United States and include in such transcript the entire Record, including:

A. All of the documents contained in the Transcript of Record on Appeal;

B. The Statement of Facts and Exhibits;

C. Respondents' Brief

D. The Opinion of the Court of March 8, 1973;

E. Petition for Rehearing;

F. Order Denying Petition for Rehearing;

G. Remittitur;

H. This Notice of Appeal;

I. Application for Allowance of Appeal and Stay;

J. Order on Application for Allowance of Appeal and Stay.

Since the Transcript will be very voluminous and the cost of preparation of the Transcript will be excessive, it is requested that the original papers be forwarded to the United States Supreme Court pursuant to United States Supreme Court Rule 12.3.

III. This appeal is from the whole of the Judgment and presents the following questions:

A. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction the equal protection of the laws or the deprivation of life, liberty or property without due process of law is violated by an order of the governing authorities of the University of Washington, a state institution, giving preference solely on the basis of race to certain persons to the exclusion of others in competition for limited spaces available in the law school.

B. Whether a rule of the University of Washington whereby white students are required, solely on the basis of

race, to meet different and more stringent criteria than are persons of certain other races in obtaining admission to the law school, violates the federal Civil Rights Act, Title 42, USC § 2000d, which prohibits discrimination or exclusion on the basis of race from any program or activity receiving federal financial assistance.

IV. Pursuant to Title 28, USC § 2103, in the event this is not deemed a proper case for appeal, this document shall serve as notice that certiorari will be applied for.

DATED this 23rd day of May, 1973.

JOSEF DIAMOND
LYLE L. IVERSEN
CRAIG S. STERNBERG
of LYCETTE, DIAMOND & SYLVESTER
Attorneys for Plaintiffs-Appellants

By /s/ LYLE L. IVERSEN

PROOF OF SERVICE

STATE OF WASHINGTON }
COUNTY OF KING } ss.

I, LYLE L. IVERSEN, one of the attorneys of record for the plaintiffs-appellants herein, hereby depose and say that on the 23rd day of May, 1973, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States upon James B. Wilson, Senior Assistant Attorney General, attorney for defendants, by depositing a true copy thereof in the United States mail at Seattle, Washington, postage prepaid, and properly addressed to him at his office at the University of Washington, Seattle, Washington.

/s/ LYLE L. IVERSEN

SUBSCRIBED AND SWORN to before me this 23rd day of May, 1973.

/s/ BERYL RYALL

Notary Public in and for the State of Washington, residing at Seattle.

APPENDIX G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

MARCO DE FUNIS and BETTY DE FUNIS, his wife; and MARCO DE FUNIS, JR. and LUCIA DE FUNIS, his wife,

Plaintiffs,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT S. HUNT and RICHARD L. RODDIS, Admissions Committee of UNIVERSITY OF WASHINGTON LAW SCHOOL; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP, and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,

Defendants.

No. 741727

ORAL DECISION

Before: The Honorable LLOYD SHORETT, Judge.

September 22, 1971
10:00 o'clock a.m.

APPEARANCES:

For the Plaintiffs: JOSEPH DIAMOND, ESQ. and CRAIG S. STERNBERG;

For the Defendants: JAMES B. WILSON, ESQ.

THE COURT: Counsel, we all know that this case is of a type that will, and indeed should be, reviewed very

quickly by the Supreme Court of the State and so I will just state my views and that Court will get a chance then to review what I have said and eventually decide the matter.

It seems to me that the law school here wished to achieve greater minority representation and in accomplishing this gave preference to the members of some races. In doing this the Admissions Committee assumed that all members of minority races, with the exception of Asians, were deprived persons. The applications of the black students were separated from all others and assigned for review to a black student and a professor who had worked closely with the CLEO program.

Some minority students were admitted whose college grades and aptitude test scores were so low that had they been whites their applications would have been summarily denied. Excluding the Asians only one minority student out of 31 admitted among the applicants had a predicted first year average above the plaintiff's.

Since no more than 150 applicants were to be admitted the admission of less qualified resulted in a denial of places to those otherwise qualified. The plaintiff and others in this group, have not in my opinion, been accorded the equal protection of the law guaranteed by the Fourteenth Amendment.

In 1954 the United States Supreme Court in *Brown v. The Board of Education* decided that public education must be equally available to all regardless of race.

After that decision the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.

The other claims made by the plaintiff are, in my opinion, without merit.

Article Nine of our State Constitution requiring the State "To make ample provision for the education of all children

residing within its borders . . ." obviously does not apply to graduate schools, *Litchman v. Shannon*, 90 Wn. 186.

There is no constitutional restriction upon admitting non-resident students. The record shows that 21.6 per cent of the entering class are non-residents. This is down from 30.9 per cent last year and perhaps due to the increase in non-residents fees. In the absence of a statutory provision or a University rule the Court cannot interfere with this determination regarding the admission of non-residents.

It should be recognized that many Washington students attend law schools in other states thus equalizing the load between the states. Students who were admitted in previous years and then drafted into the Armed Services were also admitted without further examination of credentials. This was no distinction based upon race and such regulation, it seems to me, is quite proper.

Some difficulty is encountered in determining the proper remedy to correct the discrimination. Only the plaintiff has brought an action. The other eligible applicants have not commenced timely suits against the University. I think in law they must be said to have rested on their rights and the principle of laches should prevent suits by them during this ensuing academic year which suits would interfere greatly with the conduct of the law school.

Since the plaintiff has brought this action and has very acceptable credentials and since I find that there has been discrimination here involving 30 or so students admitted upon an entirely different system than that applied to this plaintiff, I think there should be a remedy for the wrong and the plaintiff will be admitted to the law school. The defendants are directed to allow him admission to the school in this year's class.

Gentlemen, I think that disposes of the issues. Are there any questions?

MR. DIAMOND: None, your Honor. Thank you.

MR. WILSON: None, your Honor.

THE COURT: We will be in recess.

(Whereupon, at 10:10 a.m. the Court recessed.)

SUPREME COURT, U. S.
FILED
AUG 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,
Appellants-Petitioners,

—v.—

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,
Appellees-Respondents.

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR CERTIORARI

ALEXANDER M. BICKEL
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Of Counsel:

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August 17, 1973

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Appellants-Petitioners,

—v.—

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,

Appellees-Respondents.

BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AS *AMICUS CURIAE* IN SUPPORT OF JURISDICTIONAL STATEMENT OR IN THE ALTERNATIVE PETITION FOR CERTIORARI

Marco De Funis, *et al.* appeal from, or in the alternative respectfully pray that a writ of certiorari issue to review, the judgment and opinion of the Supreme Court of the State of Washington entered on March 8, 1973, rehearing denied, May 16, 1973.

Opinion Below

The opinion of the Supreme Court of Washington is reported in 82 Wn.2d 11, 507 P.2d 1169, and is printed in Appendix A to the Jurisdictional Statement or in the Altertive Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), or in the alternative under 28 U.S.C. §§1257(3) and 2103.

Consent of the Parties

Both Marco De Funis, *et al.*, and Charles Odegaard *et al.*, by their attorneys, have given their consent to the filing of this brief, and their letters of consent are on file with the Clerk of this Court.

Question Presented

Whether consistently with the Fourteenth Amendment to the United States Constitution, a State University Law School may extend a preference for admission solely on the basis of race to a certain number of persons who are concededly less qualified than applicants of other races.

Constitutional Provision

The Fourteenth Amendment to the United States Constitution provides in pertinent part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Interest of the *Amicus*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of the parent organization to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed briefs as *amicus* in this Court urging the unconstitutionality or illegality of various racially discriminatory laws and practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

Statement

Petitioner Marco De Funis was denied admission to the Washington University Law School class of 1974, commencing in September 1971, and he, his wife and parents thereupon brought suit in the Superior Court of the State of Washington seeking an order that he be admitted on the ground that the procedures by which he was excluded were discriminatory. Following trial, the Superior Court issued such an order, but the Supreme Court of Washington reversed. On June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of the judgment of the Supreme

Court of Washington pending the disposition of an appeal or petition for a writ of certiorari in this Court.

Enrollment in the University of Washington Law School is limited overall to 445 students. The entering class is limited from time to time to the residual number remaining after second and third-year students who continue in good standing are counted. In 1971, the number of places open in the first-year class was approximately 145. Applications had risen to about 1,600. (St. 33-35*)

The task of filling these 145 places was delegated to an admissions committee consisting of five faculty members and two students. (St. 330) The Law School requires that completed applications include copies of transcripts from all schools and colleges previously attended, letters of recommendation, a statement by the applicant himself, and the applicant's score on the law school admissions test, which is nationally administered. These data and documents form the basis on which the committee acts. (St. 338, 22) By means of a formula combining the law school admissions test score and the applicant's junior and senior year college grade averages, a law school predicted first year average is established. (St. 360, 56, 181, 357)

With very few exceptions, and almost always with no further consideration, the admissions committee in 1971 admitted applicants whose predicted first year average was 77 or above. The files of applicants whose predicted first year average was below 74.5 and who were not black Americans, Chicano Americans, native American Indians or Philippine Americans were examined by the chairman of

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* "St." refers to the Statement of Facts, which in this record contains the transcript of testimony.

the admissions committee alone. In the overwhelming majority of cases, these applications were rejected by the chairman without further recourse. Exceptions were made by him only for returning veterans and perhaps in one or two other cases, but no more. That left a residual category of applications, which was divided into two groups: those showing predicted first-year averages between 76.99 and 74.5 for applicants who were not black Americans, Chicano Americans, native American Indians or Philippine Americans—the group in which De Funis was included, with a score of 76.23; and those showing that the applicant was a black American, Chicano American, native American Indian or Philippine American with a predicted first year average below 76.99 as well as below 74.5. Files in the first group were assigned to committee members at random for examination and report back to the full committee, where they were eventually acted upon. (St. 340-41, 351, 342, 344) The second group, although forming part of the same residual category, was treated distinctly and separately.

The chairman of the admissions committee testified: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate consideration." (St. 344) Files of black applicants were sent to a subcommittee consisting of a law student, himself black, and a faculty member for review and report back to the full committee. Files of Chicano Americans, native American Indians, and Philippine Americans were reviewed by an associate dean for later presentation to the committee. (St. 352) Files in this separately treated group of black Americans, Chicano Americans, native American Indians and Philippine Americans were compared only with each other and not with the rest of the

applications passed upon by the committee or by its chairman individually. (St. 351, 353, 399, 402, 409)

By this method, the trial court found, 44 black Americans, Chicano Americans, native American Indians and Philippine Americans (called "minority students") were offered admission to the law school, the vast majority of whom had lower predicted first-year averages than that of De Funis, and some of whom, had they been white, would have had their applications summarily denied, presumably by exercise of the function delegated to the chairman of the admissions committee. (Findings, XXI, XXIII, Appendix C to Jurisdictional Statement or in the Alternative Petition for Certiorari, pp. 65-66.) What is more important, the method resulted beyond question in the admission, in the aggregate, of students acknowledged to be less qualified than others who, like De Funis, were rejected.

The dean of the Law School testified that "we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding in the study of law with such academic supportive assistance that we can give them." (St. 420) But he testified candidly that "I would be misleading you, I think, if I suggested" that minority students with low credentials who are admitted are "necessarily as likely to succeed in the law school curriculum as certain of the majority students who are not admitted." (St. 418) And defining the term "qualified" as indicating "the likelihood or probability [that] the student has the potential for successful study of law according to our curriculum," the dean added: "On that basis, we do take, in my opinion, some minority students who at least, viewed as a group, have a less such

likelihood than the majority student group taken as a whole." (St. 423) There followed this colloquy, which stands uncontradicted, and indeed supported, by the record as a whole:

> Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified? A. In total?
>
> Q. In total. A. In using that definition, yes. (St. 423-24)

The number of applicants admitted in this special, separate fashion was apparently not set with precision. But there was, if not a precise number, then a zone or an order of magnitude. The chairman of the admissions committee testified that there was no fixed quota. (St. 353) So did the dean of the Law School, but he said repeatedly that the policy of the School was "to achieve a reasonable representation in the classes of persons from certain minority racial and ethnic groups. . . ." (St. 416; and see St. 426) As indicated above, the policy was not to take applicants who were unqualified in the absolute sense that they had no reasonable chance of succeeding, even with supportive assistance. But, said the dean: "We want a reasonable representation. We will go down to reach it if we can. . . ." (St. 420)

The justification for this policy, as the dean stated it, was that the minority racial and ethnic groups whom the Law School now sought to provide with "a reasonable representation" were those which had been "historically suppressed and excluded from participation in what might be thought of, I suppose, the main stream of our society, and certainly in participation in the legal arena." (St. 416) The

stated assumption underlying the policy was that these groups had been and were now culturally and economically disadvantaged, and that the usual method of evaluating applicants was consequently less than usually accurate with respect to them. (St. 416-17) But there is no pretense in this record that the assumption of cultural and economic disadvantage as applied to any particular individual applicant rested on anything but his race, or that the contrary assumption, namely, that an applicant had had the normal cultural and economic advantages, in turn rested on anything but the applicant's race. Nor is there any indication that black American, Chicano American, native American Indian and Philippine American applicants were evaluated by any special test specially suitable to them. They were evaluated separately and more leniently, but by the same test as everyone else.

The dean of the Law School at one point in his testimony referred to the term, "cultural disadvantage," as a "sort of cloak of language," (St. 417), and when asked to define the difference between a minority group and a culturally disadvantaged person or group, he replied that "the semantics of this whole thing are something of a problem." (St. 424-25) There is in this record a fully candid recognition that the Law School admissions policy singled out for separate treatment applications of certain persons solely on the basis of race, and judged them more indulgently than other applicants. There is no evidence whatever that the School evolved and applied any special test, specially suitable to culturally and economically deprived applicants and capable of assessing their qualifications as rigorously as those of other applicants were assessed. (*E.g.*, St. 399)

Reversing the trial court, which had ordered that De Funis be admitted to the class of 1974, the Supreme Court of Washington held that racial classifications are not *per se* unconstitutional, if not invidious and stigmatizing; that the Law School's admissions policy does not constitute invidious discrimination any more than did the color-conscious policies mandated by *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), or by certain decisions of lower federal courts such as *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); and *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); that nevertheless a compelling state interest must be shown in order to justify classifications based on race; and that three adequately compelling state interests had been shown in this case, namely, the elimination of "racial imbalance within public legal education," 507 P.2d at 1182, the production of "a racially balanced student body at the law school," 507 P.2d at 1184, and the alleviation of a nation-wide "shortage of minority attorneys," 507 P.2d at 1184. In its statement of the case, the court noted that the Law School admissions policy proceeds from the assumption that certain racial groups have been subject to segregation and discrimination in the past and have historically been suppressed. But the court did not seem to accept this assumption as in itself constituting a compelling state interest.

The court also held that there was no denial of equal protection because only certain racial groups were singled out by the Law School admissions policy, since in light of the purpose of that policy the racial classification did not need to include all racial minority groups. The court held as well that the Law School's admissions procedure did not

constitute arbitrary and capricious administrative action, since definite numerical standards were used, and modified only where racial or other considerations seemed so to require.

Justice Wright, while joining in the opinion of the court, filed a short concurring opinion, in which Justices Finley and Stafford joined, while also joining in the opinion of the court. Chief Justice Hale filed a long dissenting opinion, in which Justice Hunter joined, while also filing a short dissent of his own.

REASONS WHY THE QUESTION IS SUBSTANTIAL OR IN THE ALTERNATIVE WHY THE WRIT SHOULD BE GRANTED

I.

The decision below misreads and misapplies, if it does not squarely conflict with, prior decisions of this Court and of other courts concerning the use of racial classifications.

It is, of course, firmly settled that any racial classification emanating from "official state sources," *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967), carries the heaviest possible presumption of unconstitutionality. The kind or degree of deprivation resulting from a racial classification is immaterial; nor does it matter that the consequences of a classification fall evenly on more than one race, or on all races. *Loving* v. *Virginia, supra; Hunter* v. *Erickson,* 393 U.S. 385 (1969); *Tancil* v. *Woolls,* 379 U.S. 19 (1964); *Anderson* v. *Martin,* 375 U.S. 399 (1964). Therefore, the Supreme Court of Washington's remark that it is "questionable whether defendants deprived plaintiff of a legal

education by denying him admission," 507 P.2d at 1181, because De Funis had been accepted at other law schools, namely, two private and two out-of-state public ones, is entirely irrelevant. It was just this consideration that the Court rejected in *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 349-50 (1938); and see *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950).

Equally irrelevant is the Supreme Court of Washington's subjective impression that the Law School's minority admissions policy is not invidious or stigmatizing, 507 P.2d at 1179. The constitutionality of racial classifications does not turn on whether a legislative or administrative body, or the highest court of a state, or even this Court, subjectively regards them as invidious and stigmatizing or not. Constitutionality turns on whether classifications work any deprivation, and even if not, on whether they are justified by a compelling interest, by "some overriding statutory purpose," *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964). "Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin* v. *Florida, supra,* 379 U.S. at 192-93. If supported by a compelling state interest a classification may be deemed to be not invidious, not stigmatizing, and constitutional. If not so supported, it is invidious and stigmatizing as a matter of law, regardless of the intent behind it.

Invidiousness, then, is not a question of fact; it is a conclusion of law. And courts would find themselves on very treacherous ground indeed if it were otherwise. Thus in the instant case, if the decisive question were whether the classification was in fact not invidious and not stig-

matizing, the answer would depend on how the classification was received by those to whom it applied. And the answer, on which this record is silent, would in truth be more than dubious. One black American who recently graduated from law school has reported:

> Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and, like certain members of the faculty, had developed paternalistic attitudes toward us. McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC, April 1970, p. 88.

Given such potential attitudes, can an openly acknowledged policy, like that of the University of Washington Law School, of applying lesser standards to a racially defined class of applicants be assumed not to be invidious or stigmatizing? See Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. OF PA. L. REV. 351, 353-59 (1970).

The cases in this Court sanctioning racial classification on which the court below relied have uniformly shared two characteristics, both of which are signally absent in the instant case. First of all, they have sanctioned the use of racial criteria—indeed, they have decreed it—as a remedy fashioned to cure unquestioned, specific previous discrimination based on race. The remedy has followed with precision a wrong shown with precision in a record. Secondly, the cases have imposed no new deprivation on anyone else. In following the wrong, the remedy created no new wrongs; it did not impinge upon or displace any rights of others.

As the Court said in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971): "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." The decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Education, supra*, was based on findings of "a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6. And this Court repeatedly emphasized in the course of its opinion that its focus was on state-imposed segregation. See, *e.g.*, 402 U.S. at 7, 11, 15, 18, 21. The same is equally true, with equal emphasis, of such earlier cases as *Green* v. *County School Board*, 391 U.S. 430 (1968); and *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969), and of cases concerning the right to vote, *e.g.*, *Louisiana* v. *United States*, 380 U.S. 145 (1965).

Nor was any deprivation of which legal cognizance can be taken imposed on anyone in these cases. Children have no legal right, certainly no constitutional right, to be zoned into one school rather than another, or to be bused only for purposes of remaining segregated but not for purposes of desegregation. Desegregation of faculties, as in *United States* v. *Montgomery County Board of Education, supra*, was not remotely shown to necessitate the loss of position on the part of any teacher for racial reasons, and if reassignment based on race was involved, it impinged on no cognizable rights, since a teacher has no more a legal, let alone a constitutional, right to be assigned to a given school than does a pupil. Again, adding to the lists voters

who had been discriminatorily kept off before obviously deprives no other voter of any recognizable right.

By contrast, the record in this case contains no evidence whatever of prior discrimination by the University of Washington, by its Law School, or by the State of Washington. The record does show that for 1969-70, the University of Washington Law School reported an enrollment of 8 black students out of a total of 356. (Defendant's Exhibit 7) That comes to approximately 2.2 percent, and compares favorably with the percentge of blacks in the population of the State of Washington, which is 2.1, and in the populations of the neighboring states of Oregon, Idaho and Montana, from which perhaps the University of Washington may be presumed also to draw students. See *United States Bureau of the Census, Census of Population: 1970, General Population Characteristics,* Washington, Final Report PC(1)-B49, Table 18; Oregon, Final Report PC(1)-B39, Table 18; Idaho, Final Report PC(1)-B14, Table 18; Montana, Final Report PC(1)-B28, Table 18; cf. *Swain* v. *Alabama,* 380 U.S. 202, 208-09 (1965).

On this record, there is also no showing of any sort that the criteria used for admission, which are summarized in the predicted first-year average, are not probative of qualification and operate or have operated so as to discriminate against certain racial or ethnic groups. There was testimony, see *supra,* p. 8, entirely impressionistic in nature, that these criteria might be somewhat unsuited to culturally and otherwise deprived persons, although not to any racial group as such. But there was no testimony indicating any doubt that the criteria reliably predicted law school performance for everyone, including by and large the culturally deprived, and there was no thought

of abandoning them. There was thus not the slightest hint that the criteria were discriminatory in the sense of operating to exclude racial groups for reasons unrelated to true qualifications. On the contrary, it was conceded that the result of diluting these criteria was the admission of relatively less qualified applicants. This result is wholly different from that involved in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); indeed the decision in the instant case is at odds with *Griggs*. Speaking of Title VII of the Civil Rights Act of 1964, under which *Griggs* arose, the Court said:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." 401 U.S. at 436.

The racial classification adopted by the University of Washington Law School was no remedy for a definable wrong within the meaning of this Court's cases discussed above. Rather the racial classification was aimed at achieving certain objectives of social policy, the desirability of which was in turn derived from an assessment of historic nation-wide practices and their present consequences. And the classification did assuredly impinge on the rights of others. The grievance is not that De Funis or anyone else has a right to be admitted to a state law school or to have his application considered in accordance with any given set of mechanical, numerical or other criteria. The point, which hardly requires argument, is that De Funis no less than anyone else has a right to be considered for admission at a state law school by a method, however dis-

cretionary, that does not discriminate against him on the ground of his race or ethnic origin. The system of racial classification imposed by the University of Washington Law School operated to deprive De Funis of this right.* In this respect, again, this racial classification is critically unlike any sanctioned in this Court's cases discussed above.

The conclusion to be drawn from this Court's decisions —with which the decision below necessarily clashes—is that a compelling state interest sufficient to justify a racial classification can be shown only if the classification is undertaken in the course of administering a remedy for proven prior discrimination, or at least if, while serving an allowable state purpose, it imposes no deprivation on anyone. Prior decisions of other courts, cited but inadequately analyzed by the Supreme Court of Washington, are in accord with this conclusion, and equally clash with the decision of the Supreme Court of Washington.

Thus *Carter* v. *Gallagher, supra,* rested on an express finding of past racial discrimination. The case concerned employment of firemen, and although a decree ordering the hiring of minority persons was affirmed, the court reversed an order of the district court requiring absolute preference for qualified minority persons in filling first vacancies. "The absolute preference ordered by the trial court," the Court of Appeals held, "would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of

* This is the foundation of standing in this case. Cf. *Peters* v. *Kiff*, 407 U.S. 493 (1972); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

one constitutional guarantee by the outright denial of another." 452 F.2d at 330.

Contractors Association of Eastern Pennsylvania v. *Secretary of Labor,* 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 584 (1971), another employment case, similarly rested on a specific finding of prior discriminatory exclusionary practices. An order establishing goals for minority hiring was approved, but it plainly provided that there was to be no discrimination "against any qualified applicant or employee," 442 F.2d at 164. Elaborate findings demonstrated, the court held, that this intention to impose no deprivation on anyone else could be realistically carried out. The labor force in question was essentially transitory and often in short supply in key trades. The findings, said the court, "disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force." 442 F.2d at 176. "Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen." 442 F.2d at 173. That is altogether different from a situation, as in this case, where 145 or so places are to be filled, and no more, and the acceptance of any less qualified applicant necessarily deprives a better qualified one of a place.

Again in *Porcelli* v. *Titus, supra,* the suspension of one method of promoting school administrators and the substitution of another was upheld in light of striking statistical evidence tending to show that the suspended method had the effect of discriminating against qualified blacks. Moreover, the trial court had found that the substituted method would not exclude anyone from consideration for

administrative positions on account of race. It was shown that "despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified. . . ." 431 F.2d at 1257, n. 4. Compare *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), where the contrary was shown, and the court, in consequence, struck down a racial balance plan as applied also to school administrators. Moreover, to the extent that race may have been a factor in *Porcelli* v. *Titus,* there was a solid basis in the record for finding that in the school system of Newark, New Jersey in 1969, race was a job-related factor. See *Porcelli* v. *Titus,* 302 F.Supp. 726, 732-33 (D.N.J. 1969).

Finally, cases such as *Offermann* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967), upheld school board policies aimed at achieving racial balance, which imposed no legally cognizable deprivation on anyone, since they closed off no one's access to a school, and no one has a right to be zoned into a particular school.

II.

The decision below distorts the remedial device of "affirmative action" which is of increasingly critical importance to the achievement of social justice and the development of harmonious race relations under law in our country. By so distorting the remedy of "affirmative action," the decision below threatens to destroy its utility.

Equality of opportunity, this Court has suggested, commenting approvingly on the purposes of Title VII of the Civil Rights Act of 1964, must not be provided "only in the sense of the fabled offer of milk to the stork and the fox." *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431. To the end of avoiding the fabled perversity, legislatures and courts have evolved the remedy of affirmative action. It is, and increasingly so, a device of great importance in the developing law of race relations. It is a flexible remedy, whose application will vary with circumstances, and it is race-conscious.*

Whatever the varying circumstances of its application, however, the limits of the affirmative action remedy must

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* There may even be circumstances when it might be permissible to take race or ethnic origin into account for job- or function-related reasons, as anti-discrimination legislation may also sometimes do. See, *e.g., Porcelli* v. *Titus, supra,* 302 F. Supp. at 732-33; *Freeman* v. *Morton,* Civ. No. 327-71 (U.S. District Court for the District of Columbia, 1973); *Mancari* v. *Morton,* Civ. No. 9626 (U.S. District Court for the District of New Mexico, 1973); cf. *B.P.O.E. Lodge No. 2043 of Brunswick* v. *Ingraham,* 297 A.2d 607 (Sup. Ct. Me. 1972), *appeal dismissed,* 93 Sup. Ct. 1893 (1973). Cases arising in such circumstances present a wholly different problem from the affirmative action and preferential treatment issues discussed in the text above.

be clearly established to be those set by the leading cases discussed in the previous section of this brief, else the remedy will end up destroying itself. Without these essential limits, the remedy of affirmative action will collapse into the very evil it seeks to cure; and then surely the impulse to abandon it altogether will be irresistable. In the instant case, those limits have been plainly transgressed. This is a polar case. The lines of distinction in this area are often thin and can often be perceived with assurance only in the light of experience. The instant case, however, stands at an extremity, well outside a clearly defined line. It calls for a firm assertion of the limits indicated in prior decisions of this Court and in other leading cases. Only thus can the future utility of the remedy of affirmative action be ensured.

The importance and pervasiveness of the problem are demonstrated by the volume of litigation, and the need for guidance is shown by the occasional tone of groping uncertainty that is evident in some of the decisions, although we have found no case of the extremity of the instant one.* For illustration of the significance and magnitude of the problem in the field of higher education, in which the instant case arises, see the article by President John H. Bunzel of California State University at San Jose, *The Politics of Quotas*, CHANGE, October, 1972, p. 25.

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* See, *e.g.*, in addition to cases cited in the previous section of this brief, *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *National Labor Relations Board* v. *Mansion House Center Management Corporation*, 473 F.2d 471 (8th Cir. 1973); *Southern Illinois Builders Association* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972); *N.A.A.C.P.* v. *Allen*, 340 F. Supp. 703 (N.D. Ala. 1972); *Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973); *Erie Human Relations Commission* v. *Tullio*, 357 F. Supp. 422 (W.D. Pa. 1973).

It is proper and may be necessary to follow the specific proven wrong of prior discrimination—not, as noted, shown in this case—with an equally specific remedy, which might include a race ratio as a starting point. Even so, as the Court pointed out in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 24, the Constitution requires no "particular degree of racial balance or mixing," and "that approach would be disapproved. . . ." Again, it may be proper for school authorities to conclude that "in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 16. That is not to justify, however, imposition of such a ratio as a means of excluding better qualified applicants from admission to a limited number of places in a state school, rather than as an assignment policy. Similarly, even in the absence of proof of prior discrimination, it is proper and may be necessary to require an employer or a university to cast a wider recruiting net than in the past, and to set a goal for minority recruitment which may act as a spur. But it is one thing to enforce such a policy on the basis of a finding that there is an adequate existing pool of qualified minority persons and that the new recruitment policy will not exclude any qualified candidates for reasons of race. It is quite another thing, without any pretense at remedying proven prior discrimination, and even when such past discrimination can be shown to have existed, to require the employment or the admission to a school or to any other position of unqualified or less qualified persons solely on the basis of their race. When this is done, a cost is paid in loss of efficiency and in injustice.

Loss of efficiency and productivity is no help to anyone. And in a society in which men and women expect to succeed by hard work and to better themselves by making themselves better, it is no trivial moral wrong to proceed systematically to defeat this expectation; the more so as for some groups that do not now benefit from affirmative action programs prejudice has only recently been overcome, and the expectation that members of such groups might rise by merit has just begun to be fully met. In many employments artificial qualifications have been erected, or wrong ones, unduly bound to middle-class culture and insufficiently related to true efficiency, and these ought properly to be reexamined. But to reject an applicant who meets established, realistic and unchanged qualifications in favor of a less qualified candidate is morally wrong, and in the aggregate, practically disastrous.

The bright line between a beneficent policy of affirmative action and a policy that is a moral wrong and a practical disaster is starkly illustrated by the record in the instant case. With the best will in the world, no doubt, the University of Washington Law School instituted a policy that amounted to the establishment of a quota, no matter what "cloak of language" was ingenously used by the Law School to disguise the fact from itself as well as from others. The size of the Law School entering class was fixed to within approximately five places, and there was never any consideration given to expanding it. (St. 115, 333-34) Minority and non-minority applicants went, as we have shown, through separate evaluative procedures. The most desirable students were chosen from both the minority and the non-minority groups, but the candidates in one group were never compared with candidates in the other. The

admissions committee was therefore faced with two groups of students it wished to accept, and one class in which to put them. Somehow a decision had to be reached to apportion some part of the fixed number of places in the class to one group, and the remainder to the other. Undoubtedly the number of places allotted to minority applicants was not exactly the same from year to year, and undoubtedly the decision was made as loosely and implicitly as possible. But in the absence of any comparison between the two groups of applicants, the decision had to be made. A quota is no less a quota because it is undeclared and because it is subject to annual adjustment, or because it is called "reasonable representation."

It is true, as noted earlier, that the dean of the Law School testified that the School would "go down to reach [a reasonable representation] if we can, but we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding. . . ." (St. 420) But a quota is still a quota even if occasionally there are not enough applicants to fill it. An entirely separate admissions procedure based on race and leading to separate acceptances was used in this case. In effect, the entering class at the University of Washington Law School in the fall of 1971 was two classes, one of minority students and one of majority students, recognized and chosen as such.

If the School's purpose had been to restrict the number of minority students below the number who would be admitted in the absence of the quota, the practice would be unconstitutional beyond question. This was not the purpose, obviously. But a quota is a two-edged instrument.

It cannot help but be, regardless of the motive of its user. The aims of the policy in this case, as the Supreme Court of Washington approved them, were the achievement of a racially balanced student body, and the alleviation of a shortage of minority attorneys, which can certainly be read as meaning the achievement of a racially balanced profession. Not dissimilar purposes were cited, in equally good faith, no doubt, by President A. Lawrence Lowell of Harvard and others in the 1920's, when a number of private universities sought to impose quotas—restrictive ones, to be sure—on the admission of Jewish students. See 74 *Literary Digest* 28, July 8, 1922; Yoemans, ABBOTT LAWRENCE LOWELL 209-16 (1948).

Of course, the aims were different then. To recruit is different than to restrict recruitment. But balance and representation—concepts that abandon the criterion of merit—cannot avoid restriction as well as recruitment, so long as the number of places to be filled is limited. The purpose of President Lowell of Harvard was to restrict, and the purpose of the University of Washington Law School was to recruit, but the point is that restriction is inevitably implicit if the number of available places remains stable and the criterion is not merit but race or ethnic origin. And the point is that the same policy objective of producing balance and representation, pursued in equally good faith, supports the restriction as much as it supports the recruitment.

It remains only to note a particular irony in the policy of the University of Washington Law School. The policy is based, as we have noted more than once, not on any proven past discrimination, but on an assessment of historic conditions of disadvantage prevailing as to certain

groups. Yet despite this premise, the policy is applied to only four racial groups. The irony of assuming in the State of Washington that a history of discrimination and disadvantage is an attribute only of these groups and not of Asian-Americans will be pointed up by a glance at *Terrace* v. *Thompson*, 263 U.S. 197 (1923), the land-ownership restriction case, which arose in Washington, and by the realization that Gordon Kiyoshi Hirabayashi was, in 1942, a student at the University of Washington. *Hirabayashi* v. *United States*, 320 U.S. 81, 84 (1943). The irony is of constitutional dimension. Given the assumptions and the purposes of the policy in question, there arises, to say the least, a serious equal protection problem. See *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Appellants-Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION OF DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW AND STATEMENT IN OPPOSITION TO CERTIORARI

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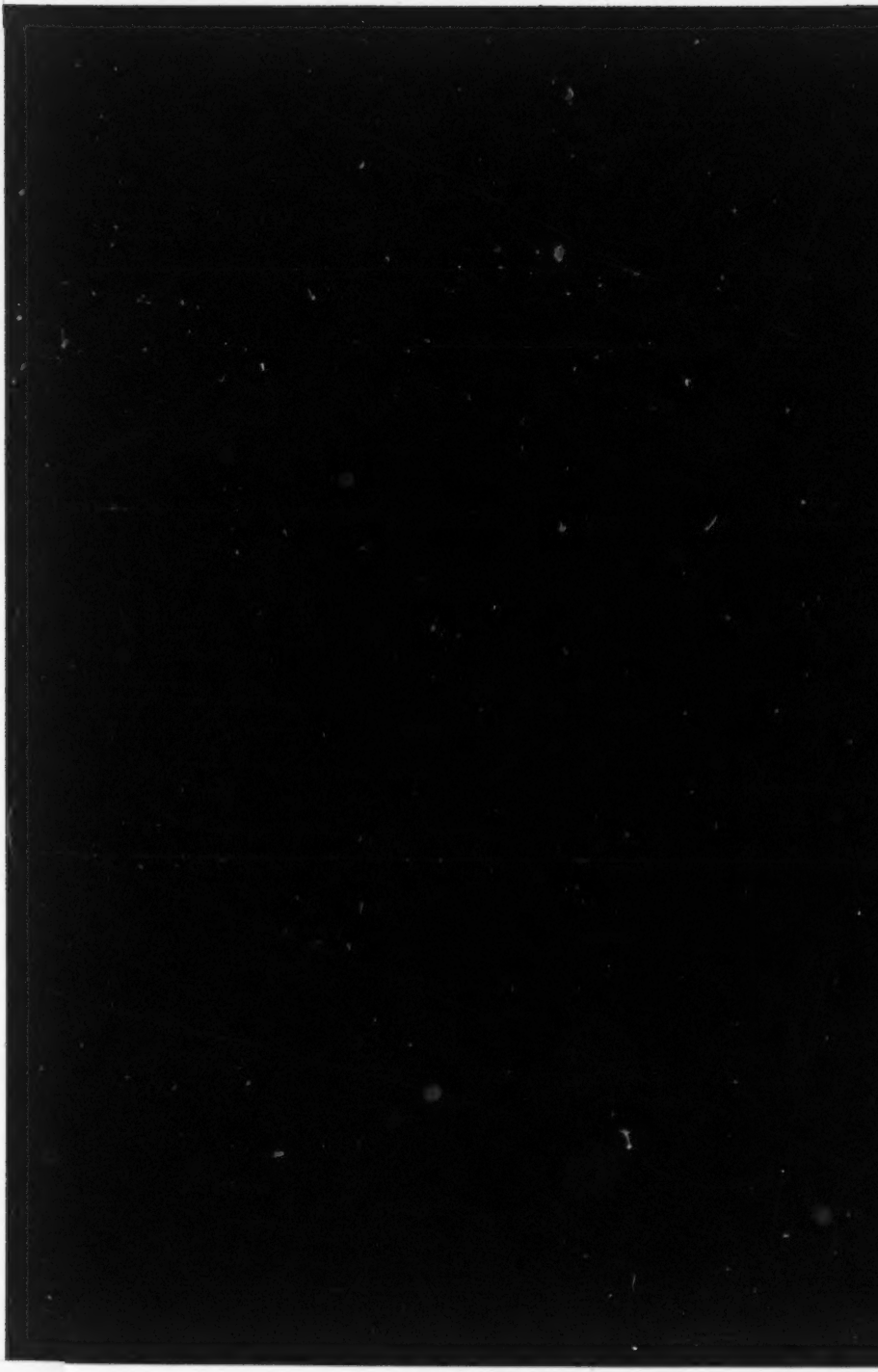

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IN THE

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MARCO DEFUNIS, *et al.*,
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v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
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OF THE STATE OF WASHINGTON

MOTION OF DISMISSAL OF APPEAL OR, IN THE ALTERNATIVE, AFFIRMANCE OF THE JUDGMENT BELOW AND STATEMENT IN OPPOSITION TO CERTIORARI

MOTION TO DISMISS OR AFFIRM

Appellee-respondents move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Supreme Court of the State of Washington on the grounds that the appeal is not within the jurisdiction of this Court, the judgment rests on adequate non-federal grounds, and it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellants' jurisdictional statement alternatively petitions for certiorari. This motion to dismiss or affirm should also be considered as a brief in opposition to the petition for certiorari.

JURISDICTION

Appellant-petitioners assert jurisdiction under 28 U.S.C. 1257(2) and, alternatively, under 28 U.S.C. 1257(3) pursuant to 28 U.S.C. 2103.

They challenged the admissions policy of the board of regents of the University of Washington, an agency of the State of Washington, as it was implemented by the law school of the University of Washington, in the King County Superior Court after appellant-petitioner Marco DeFunis, Jr., had been denied admission to the law school class commencing September, 1971. This challenge was based in part on the federal constitutional ground that application of the admissions policy as it affected the appellant Marco DeFunis, Jr., denied him the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the United States Constitution.*

STATUTES

Neither appellants-petitioners nor *amicus curiae* identify any statute, or anything resembling a statute, the constitutionality of which is challenged. An informal statement describing the minority admissions policy is neither regulation nor statute.

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* Appellants now claim the application of that policy also violated Section 2000(d), Title 42, United States Code. That issue was first raised in their brief as respondents before the Supreme Court of the State of Washington, and such claim was not ruled upon by that court. In *Unemployment Compensation Dept. v. Hunt*, 17 Wn.2d 228, 241, 135 P.2d 89 (1943), that court held as follows:

> "... questions which are not raised in any manner before the trial court will not be considered on appeal."

The principle has been adhered to as recently as December, 1970, in *Wash. Osteopathic Medical Assn. v. King County Medical Service*, 78 Wn.2d 577, 478 P.2d 228 (1970).

See also *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955 (1965), where this Court refused to consider federal constitutional questions not raised by the appellant in the *trial court* in the State of Washington, stating:

> "The Washington Supreme Court has unfailingly refused to consider constitutional attacks upon statutes not made in the trial court ..."

QUESTION PRESENTED

If this Court accepts jurisdiction, it should be limited to the question: May the law school of the University of Washington, a state university, constitutionally take into account, as one element in selecting from among qualified applicants for the study of law, the races of applicants in pursuit of a state policy to mitigate gross under-representation of certain minorities in the law school and in the membership of the bar?

STATEMENT

The University of Washington is one of two universities within the State of Washington operated by the state. (Revised Code of Washington (RCW) Ch. 28B.20.) It was established by the Territory of Washington in 1861 and is located in the City of Seattle in a metropolitan area with a population of over 1,000,000 people. There are approximately 34,000 students currently enrolled at the university. It has the only state-operated law school. Current enrollment at the law school is 445 students.

The government of the university is vested in a board of regents of seven members who are appointed for terms of six years by the governor subject to the confirmation of the state senate (RCW 28B.20.100). The board has the "full control of the university and its property of various kinds . . ." and employs the president and faculty. It also is authorized to establish entrance requirements for students seeking admission to the university (RCW 28B.20.030). The board may delegate to the president of the university or his designee any of the powers or duties vested in it (RCW 28B.10.528). The faculty of the university has responsibility for the "immediate government"

of the university under such rules and regulations as the board of regents may prescribe (RCW 28B.20.200).

Marco DeFunis, Jr., was one of 1601 applicants for 150 places available for first-year students who were to begin the study of law at the University of Washington in September, 1971. Like Mr. DeFunis, most of the applicants were qualified both by the "mechanical" or mathematical quantifiable standards available to the law school, and by the more subjective factors used to predict success in law study. (St.* 33, 219, 334, 336.)

The "mechanical" standards are similar to those used generally by law schools throughout the United States, and consist of a combination of undergraduate pre-law school grade point averages (GPA's) and scores from the nationally-administered Law School Admissions Test (LSAT). In combination, these two factors provide a "predicted first-year average" (PFYA). In addition to these numbers, the law school exercises judgment in its admissions decisions by taking into account such things as the quality and consistency of academic records, evidence from letters of recommendation and the applicant's statement, and the applicant's record of achievements (Ex. 45, St. 479).

The law school's admissions process was explored at great length in the trial court. The trial court found no deficiency in respect to any of the foregoing aspects of the process. The only defect in the process asserted by the trial court was that by which members of under-represented minority races in the law school and at the bar in Washington were admitted to the law school despite somewhat lower predicted first-year averages in some (but not all) cases.

* "St." refers to the Statement of Facts, that portion of the record before this Court containing the transcript of the proceedings before the King County Superior Court.

All students who were admitted to the law school, whether or not a member of a minority race, were determined to be qualified to study law. No "quota" in the sense of a fixed number of admittees in any category, or in the sense of a ratio or percentage, was ever established (St. 420). No student was ever excluded from the law school because of his race, except in the sense that if minority students had not been admitted there may have been more of the 150 first-year places available to non-minority students. Until the university initiated an affirmative action program there were rarely if ever more than one or two black law students enrolled in the law school at any one time.

Applicants to the law school must have earned an undergraduate degree and taken the Law School Admission Test (St. 38, 39). They must also submit with their applications a copy of transcripts from all schools and colleges which they have attended, together with statements from appropriate officials at the applicants' undergraduate institutions, letters of recommendation, and such other statements as they may wish to submit in support of their application (St. 339, Ex. 43).

The law school faculty, pursuant to the authority delegated to it by the board of regents and the president of the university, had established an Admissions and Re-admissions Committee composed of five faculty members and two students which actually made the admissions decisions (St. 330).

The Law School Admissions and Re-admissions Committee, in considering the applicants and determining who would and who would not be invited to attend the law school, separated from the applicant files those files whose applicants had identified themselves as members of minority races, i.e., Black, Chi-

cano, American-Indian, and Filipino-American.* The minority applicants' files were considered by a sub-group of the admissions committee deemed particularly competent to ascertain who among them had the highest probability of succeeding in law school and should be recommended to the entire committee for admission (St. 351–353). This procedure was part of the affirmative action policy of the university of seeking greater representation of students from those racial minorities who have suffered from the effects of past racial discrimination (St. 233). As a consequence of its policy, the law school included within the admitted group of applicants some members of racial minorities whose "mechanical" credentials were lower than some of those of the non-minority applicants but whose entire record showed the committee that they were capable of successfully completing the law school program and of making material contributions to the class, the law school, and subsequently to the profession of law.

Appellant-petitioner DeFunis was not among those admitted to the law school class although he had higher "mechanical" credentials than some of the minority applicants who were enrolled.

Mr. DeFunis is presently commencing his final year in the law school by reason of the order initially entered in this matter by the Honorable Lloyd Shorett, Judge of the Superior Court of the State of Washington for King County, which order, though reversed by the Supreme Court of the State of Washington, is still in effect due to the stay entered herein by

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* Other Asian-American applicants were not under-represented in the profession or in the law school and there was, therefore, no reason to extend a special admissions policy to them (St. 352).

Mr. Justice Douglas.*

ARGUMENT

I. *The Appeal is not within the Jurisdiction of the Court because no State Statute within the Meaning of 28 U.S.C. §1257(2) Exists*

The appellate jurisdiction of this Court depends on an unsuccessful challenge before the Washington Supreme Court of the validity of a Washington State "statute" on the grounds of its being repugnant to the Constitution of the United States. 28 U.S.C. 1257(2).

Appellant-petitioners cite no Washington statute which they challenge but merely claim that the "rule or policy referred to . . . is equivalent to a statute of the state of Washington." (Juris. St. 3.) The policy challenged is the admissions policy of the University of Washington which permits those charged with the admissions decisions to consider the race of the applicants as one factor in a "general attempt to convert formal credentials into realistic predictions" (Ex. 45, St. 479; *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973); Juris. St. A-10) and for the purpose of avoiding reliance solely upon "mechanical" credentials which could well result in unfairly denying admission to qualified applicants from minority races. *DeFunis v. Odegaard, supra* (Juris. St. A-11).

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* Appellant-petitioners' Appendix B (Juris. St. A-58) omits an important portion of Judge Shorett's order which reads as follows:

> "It is ordered, adjudged and decreed that the defendants are directed to allow the plaintiff Marco DeFunis, Jr., admission to the University of Washington School of Law, class of 1974, as of September 22, 1971, and it is further . . ."

Pursuant to that order Mr. DeFunis was admitted and has completed the first two years at the law school while this matter has been pending. Assuming his present rate of progress, he will complete his third year and be awarded his J.D. degree at the end of the 1973/74 academic year regardless of the outcome of this appeal.

This "policy" should not be equated with a "legislative act" such as that considered by this Court in *Hamilton v. Regents of the University of California,* 293 U.S. 245, 55 S. Ct. 197 (1934) where the "rule" of the board of regents requiring all male students enrolled at the University of California to take certain courses in military science was challenged. The real act challenged here is the discretionary one taken on behalf of the board of regents by the law school's Committee for Admissions and Re-admissions of denying appellant-petitioner's admission to the university's law school while, at the same time, admitting others from minority races with lower "mechanical" credentials. Discretionary actions taken by an admissions committee of a state university are not acts "legislative in character" which would give this Court appellate jurisdiction under the rule of *Hamilton v. Regents of the University of California, supra,* and this appeal should, therefore, be dismissed.

II. *The Judgment Appealed from Rests on an Adequate Non-Federal Basis*

While the Washington Supreme Court chose to dispose of the matter before it by resolution of constitutional issues,*

* Thirteen Briefs *Amicus Curiae* were filed in the Washington Supreme Court in support of or opposition to the constitutional issues argued by the appellants in that court. Among the eight *amici* supporting the law school's position were attorneys representing the American Bar Association, the Association of American Law Schools, the Law School Admissions Council, the Council on Legal Education Opportunity, the Seattle–King County Bar Association, the City of Seattle, the American Civil Liberties Union, the American Indian Law Students Association, Inc., the Black American Law Students Association, and the Law Students Civil Rights Research Council. The five *amicus* briefs filed in opposition to the law school's position included one filed on behalf of the Anti-Defamation League of B'nai B'rith, one on behalf of the National Jewish Community Rights Council, Inc., and three by individual attorneys.

appellee-respondents urged that court to reverse without reaching the constitutional issues ruled upon by the trial court.

The claimed injury to Marco DeFunis' constitutional rights is that he failed to be admitted to law school because he was not a member of one of four minority races. If that were the issue, it could not be presented by Mr. DeFunis in this case because the necessary factual foundation is lacking. The trial court found that "some minority students were admitted to the University of Washington school of law prior to and instead of the appellant Marco DeFunis, Jr." (Juris. St. A-66.) We excepted to that finding because the record affirmatively establishes, and without contradiction, that Marco DeFunis would not have been admitted had there been no minority program of admissions to the law school (St. 453–455). Only 36 letters of acceptance were sent to minority applicants (18 of whom actually enrolled), and at least 55 applicants were ranked ahead of DeFunis on the waiting list (St. 379).

Only one who has a personal interest or stake in the adjudication of a constitutional issue has standing to press for its resolution.

As this Court has said on numerous occasions:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" *United States v. Handy*, 351 U.S. 454, 462, 76 S. Ct. 965 (1956), *Beck v. Washington, supra* footnote p. 2, *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 281, 63 S. Ct. 236, 242, 87 L. Ed. 268 (1942). See also *State v. Bogner*, 62 Wn.2d 247, 258, 382 P.2d 254 (1963).

Amicus contends that *Peters v. Kiff*, 407 U.S. 493 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), are dispositive of this standing issue. (Amicus Brief in Support of Jurisdictional Statement 15*.) In fact, those two cases uphold standing to litigate quite a different issue from the issue which Mr. DeFunis asserts.

In *Peters v. Kiff*, the standing issue was whether a white defendant might complain of the systematic exclusion of Negroes from the grand jury which indicted and the petit jury which found him guilty. In *Trafficante v. Metropolitan Life Ins. Co.*, the issue was whether two tenants, one white and one non-white, had standing to complain that their lessor discriminated in leasing practices against non-whites. In both cases the Court not only upheld the standing but decided the case on the merits against the racial discrimination. In *Peters*, Mr. Justice Marshall's plurality opinion identified the protected right as a right to a jury from which members of no race had been arbitrarily excluded. In *Trafficante*, the issue was characterized from the beginning as related to a right to live without either economic disadvantage or the stigma attached to residence in a "white ghetto." In both cases, the underlying and ultimate value is that of a pluralistic society, and standing does not depend on the complainant's race.

It is true that both *Peters* and *Trafficante* sustain standing to complain of anti-minority discrimination when the complainant is not a member of the minority. Standing, however, is a concept of relation between a litigant and the issue litigated or the right claimed. To establish standing, it is necessary for DeFunis to accept a formulation of an issue like that in *Peters* and *Trafficante*. Under that formulation, values of a pluralistic society and diversification among races are clearly permissible

* Referred to herein as Am. Br.

in the interests of majority and minority races alike. That issue he loses on the merits, as part III of this Argument will demonstrate.

Only by rejecting *Peters* and *Trafficante* can the issue be posed in terms of a constitutional right violated whenever the law for any purpose takes race into account. On that basis, DeFunis lacks standing because it is clear he would not have been admitted had the admission policy followed the mechanical criteria which he contends that all "color blind" and "race blind" schools are compelled to follow.

The Washington Supreme Court did not decide the factual issue whether DeFunis would have been admitted had there been no minority admissions program. Without a sustainable finding that DeFunis would in some demonstrable way be affected by whether he won or lost the litigation, the case lacks an essential ingredient to a case or controversy cognizable or appropriate for decision by this Court. There is no party with any real interest in the controversy, and a justiciable controversy is not tendered for decision.

III. *The Judgment of the Supreme Court of Washington Presents no Substantial Federal Question*

The unanimous opinion of this Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971), disposed of the only issue which earlier might have been arguable when it said:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; . . ." 402 U.S. at 16.

Amicus concedes that race must be taken into account if this case involved an institution with a history of *de jure* segregation. However, the privilege of educating students of all races and all colors is the privilege of all institutions to educate for a pluralistic society. It is not reserved to those institutions which can establish that they were formerly guilty of racial discrimination. Nor is it for the benefit solely of members of minority races. It is for the benefit of all races, and nowhere is recognition of this value more important than in a law school.

This Court decided *Sweatt v. Painter*, 339 U.S. 629, 94 L. Ed. 1114, 70 S. Ct. 848 (1950), four years before *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1950 it recognized that education of lawyers takes place in important part between student and student, not exclusively between student and professor. In that decision, the Court said:

> "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt v. Painter, supra*, 339 U.S. at p. 634.

A lawyer's education which omitted the Thirteenth, Fourteenth, and Fifteenth Amendments, and the history of attempts to enforce them, would be as incomplete as a course in American history which left out the administration of Abraham Lincoln. A law school in which all black students were systematically excluded would provide an incomplete education for its remaining students. It would make no difference in this respect whether exclusion resulted from laws, from custom, from cultural deprivations, or something even more difficult to identify.

The University of Washington's law school has attempted to take a modest step in achieving legal education for a multiracial and pluralistic society. The Supreme Court of Washington has declared that what the university has done is in furtherance of a compelling state interest in the light of lack of minority representation in the law school and in the legal profession. Other law schools, like other universities, have moved by affirmative action programs to achieve racial integration in education. The manner in which such programs operate may raise many legal issues but there is no such issue in this case. The law school's admissions program was upheld by the trial court, save in one respect. It takes the race of minority applicants into account, and the trial court said it thereby offended the teaching of the first Mr. Justice Harlan's inspired metaphor that the Constitution is color-blind.

Never before, so far as we know, has that metaphor been taken thus literally and out of the context of its appropriate use. Justice Harlan applied the metaphor in dissent from an opinion which upheld racial segregation. He would not have declared legislation in support of the Freedmen's Bureau, of American Indian education, or to rectify any other racial injustice, unconstitutional.

Four distinguished constitutional scholars summarized the authority as of 1967 on this point accurately when they wrote:

> "The highest court of no state and the court of appeals in no federal circuit, however, has yet applied the Harlan ['color-blind constitution'] metaphor to strike down a local effort to reduce racial imbalance in the schools. The far more troublesome questions are related to . . . what affirmative action the constitution may require the school authorities to take to reduce an existing imbalance." Freund, Sutherland, Howe, Brown, *Constitutional Law, Cases and other Problems*, 1140 (1967).

There is no way an affirmative action program to benefit disadvantaged racial minorities can operate without taking race into account. There is no way the decision of the Washington Supreme Court can be reversed on the record before it without constitutional condemnation of all affirmative action programs. That, we believe, is the only issue posed in this case. It has already been resolved by this Court in favor of the result the Washington Supreme Court reached. *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

Furthermore, in *Green v. County School Board*, 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968), this Court, in considering a "freedom of choice" plan which did not assign any student on the basis of race, held that the plan was inadequate to eliminate a state-imposed segregated pattern of longstanding and further held that racial awareness of the composition of the school system is probably essential as a "starting point" in seeking to remedy the effects of past discrimination.

In correcting the effects of past discrimination, this Court has stated:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45, 28 L. Ed. 2d 586, 91 S. Ct. 1284 (1971).

Accord, United States v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1966); *aff'd en banc.*, 380 F.2d 385 (1967), *cert. denied*, 389 U.S. 840, 19 L. Ed. 2d 104, 88 S. Ct. 77 (1967).

On at least two occasions this Court has had the opportunity to review and denied certiorari where a question similar to that raised in this matter has been before the Court. Thus, in *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402

U.S. 944, 29 L. Ed. 2d 112, 91 S. Ct. 1612 (1971), this Court refused to review the Third Circuit decision upholding the school board's judgment to suspend the ordinary promotional system upon racial considerations wherein that court stated:

> "State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment."

This Court has also refused to review an Eighth Circuit Court order which authorized the district court to order the Minneapolis fire department to hire minority applicants notwithstanding its civil service rules, even though in so doing "more qualified non-minority applicants might be bypassed." *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

Finally, this Court has ruled in an analogous case dealing with the application of Title VII of the Civil Rights Act of 1964 that testing or measuring procedures may *not* be given a controlling force where it appears that their use effectively bars from employment racial minorities with a history of invidious discrimination, unless such procedures "are demonstrably a reasonable measure of job performance." *Griggs v. Duke Power Co.*, 401 U.S. 427, 91 S. Ct. 849 (1971).

Yet, appellant-petitioners have asked this Court to require the law school to rely exclusively on such "mechanical" standards in making its admission determinations even though the effect would be to exclude qualified racial minority applicants from law school and, hence, from the legal profession.

Amicus, arguing in support of the appellant-petitioners' jurisdictional statement, suggests that the Washington Supreme Court, in reaching its decision in this matter, tread upon the "very treacherous ground" of finding the questioned classi-

fication non-invidious on some subjective basis, arguing that all such classifications are invidious unless they are justified by a compelling interest—"some over-riding statutory purpose." (Am. Br. 10,11).) While *amicus'* argument is based on this Court's opinions over-ruling criminal statutes in which the test of criminal conduct is the color of a person's skin (hardly the purpose for which the challenged classification occurred in the instant case), the argument is not relevant here since the Washington State Supreme Court specifically found that:

> "... the state has an over-riding interest in promoting integration of public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling." *DeFunis v. Odegaard, supra.* (Juris. St. A-24)*

That court further found that:

> "The state also has an overriding interest in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation ...
>
> ....
>
> The legal profession plays a critical role in the policy-making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the

* The gross under-representation of minority lawyers in the profession nationally (see Ceilhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073) is present in the State of Washington as well. For example, a recent study for the National Bar Association by the Honorable Edward B. Toles, Referee in Bankruptcy in the U.S. District Court (N.D., Ill.) and Chairman of the NBA's Committee on the Judiciary, showed that in the State of Washington there was one white lawyer for every 720 whites in the state, and one black lawyer for every 2436 blacks in the state. (The Toles' report is reprinted in the Congressional Record for September 2, 1970, page 30788.)

> state in producing a racially balanced student body at the law school is compelling." *DeFunis v. Odegaard, supra.* (Juris. St. A-25–26.)

In reaching these conclusions, the court recalled the language of this Court in *Sweatt v. Painter, supra,* quoted above.

Finally, that court found that:

> "[T]he consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived." *DeFunis v. Odegaard, supra,* (Juris. St. A-26.)

That court concluded:

> "[T]hat defendants [appellees-respondents] have shown the necessity of the racial classification herein to the accomplishment of an *over-riding state interest* and have thus sustained the heavy burden imposed upon them under the equal protection provision of the Fourteenth Amendment." *DeFunis v. Odegaard, supra.* (Juris. St. A-27.)

The credentials of the Washington Supreme Court to appraise the compelling nature of the State's interest with respect to legal education and the legal profession are obvious. In Washington, the State Bar Association is an agency of the state. Admission to membership in that association is a prerequisite to practice in the state's courts, and to provide legal advice. The Washington Supreme Court approves rules for admission to practice and for disbarment. It has ultimate responsibility for the enforcement of those rules.

However, even if this Court were to disagree that the state's interest is compelling, this would not permit reversal of the decision. Three other issues would require determination:

1. Is a "compelling state interest" required when, as in this

case, the discrimination is "benign," i.e., discrimination in favor of a disadvantaged minority? In this Court, unlike the Washington Supreme Court, race as a "suspect category" has required a compelling state interest for its justification only when it is discrimination against minorities. The Washington court has upheld the university's admission policy by following what is probably the most difficult route. Benign discrimination might well be permissible in the circumstances of this case whether the state's interest is classified as compelling or not.*

2. In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971), this Court declined to reach the question whether *de facto* segregation in public schools which results from unconstitutional discrimination in non-educational matters requires public education to employ corrective measures.** Reversal of the Washington Supreme Court's decision would require decision of that issue. While we believe it is true that the University of Washington has never in its history been guilty of invidious discrimination on account of race, it is undeniably true that many kinds of invidious and legally condoned discrimination have contributed to the admission pattern that the university now seeks to correct. Racially restricted covenants, invidious racial discrimination in employment, in public accommodations, even in the right to be buried in a publicly licensed cemetery, are all a part of the state's unfortunate and recent history, within the memory of present students.

---

* See Freund, Sutherland, Howe, Brown, *Constitutional Law, Cases and other Problems, supra.*

** "We do not reach in this case whether the showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." 402 U.S. at 23.

3. The nature of the complainants' grievance would require examination. At most, Marco DeFunis can complain that his chance of admission was slightly lessened because of the program of which he complains. Every program designed in any way to aid a disadvantaged minority involves similar costs, whether it is inability of some to attend a neighborhood school or an allocation of resources to remedial programs instead of to programs for those educationally advantaged. Such grievances traditionally have been answered by a rule stated in terms of standing, or by definition of the substantive constitutional right which excludes a right to attend a particular school, or to a particular kind of education that might have been available but for a remedial or minority-oriented program.

Unless this Court is prepared to reject the Washington court's determination that the law school's program is in furtherance of a compelling state interest, and in addition is prepared to reject the university's position with respect to each of the other three issues, the decision below must stand. If the decision below does not stand, every means available to the State of Washington to deal with a critical problem in education, with composition of the legal profession, and with *de facto* segregation in the state's only law school will—unless the Court can point a way as yet undiscovered—have been foreclosed. Beyond the State of Washington and beyond the issues of a pluralistic legal education, a reversal of the decision below will endanger all affirmative action programs throughout the nation and across the entire spectrum of activities in which they are employed.

CONCLUSION

Appellee-respondents respectfully urge this Court to dismiss this appeal for the reason that this Court has no jurisdiction

and this matter may properly be disposed of without reaching the constitutional issues raised, and no substantial federal question is raised. In the alternative, appellee-respondents respectfully urge this Court to affirm the opinion of the Supreme Court of the State of Washington for the reason that the constitutional issues raised herein have already been effectively ruled upon by this Court in other cases. For the reasons given in the motion to dismiss or affirm, appellant-petitioners' alternative petition for writ of certiorari should be denied.

Respectfully submitted,

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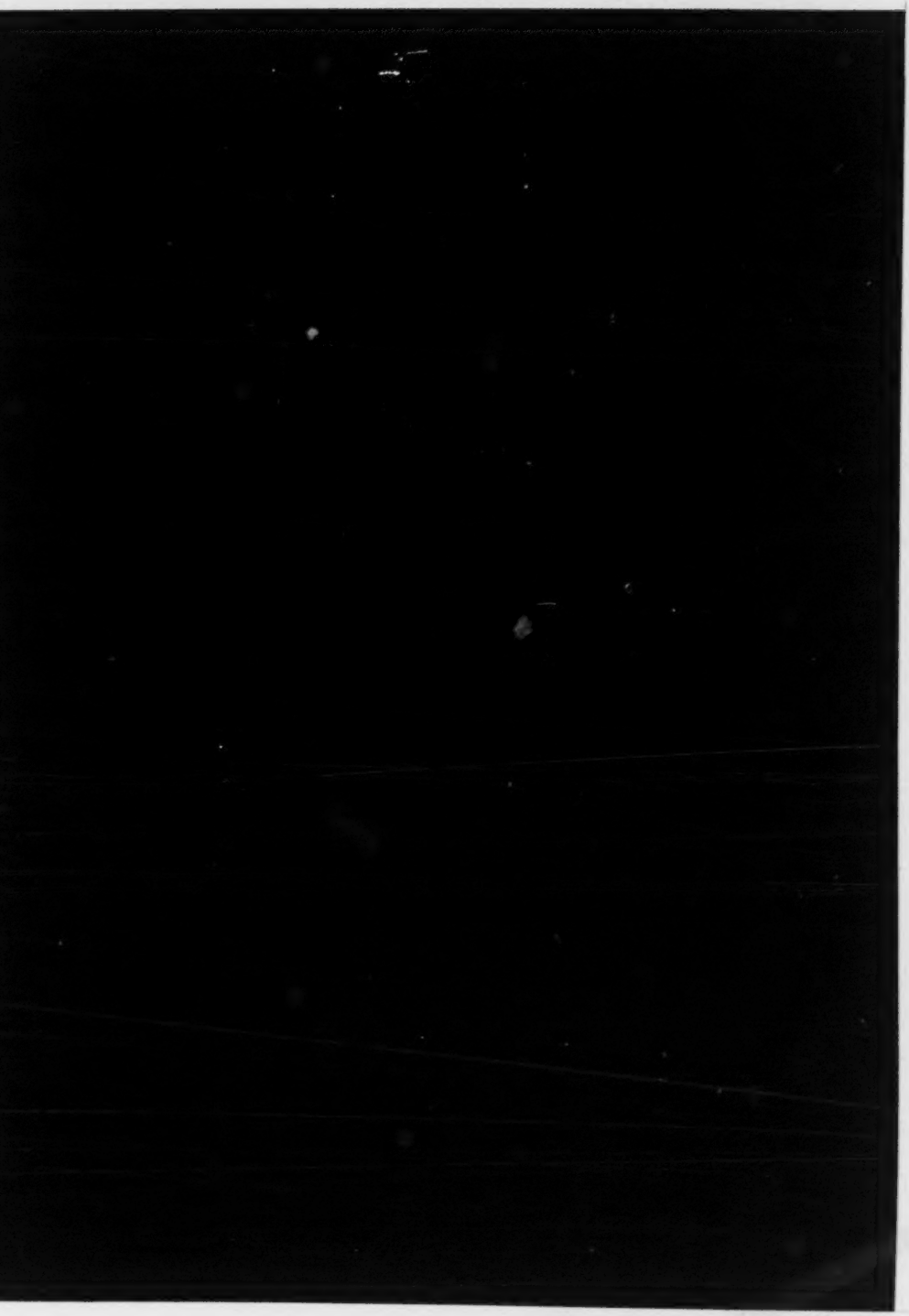

Supreme Court, U. S.
FILED
DEC 26 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington.

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

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MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
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On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE JEWISH RIGHTS COUNCIL AS *AMICUS CURIAE*

Interest of the *Amicus*

The Jewish Rights Council, *Amicus*, was founded in 1971 for the purpose of ensuring and promoting equality of all

persons before the law, and in that manner to strengthen and preserve the security and constitutional rights of Jews in America through the preservation of the equal rights of all Americans. The Jewish Rights Council believes that the welfare of Jews in this country is inseparably related to and dependent upon the equality of treatment of all Americans, regardless of race, religion, creed, or ethnic background. The membership of the Jewish Rights Council includes over one hundred Rabbis from over thirteen states, reprecenting Orthodox, Conservative and Reform Congregations. The leadership of the Jewish Rights Council includes Rabbis who marched with the late Reverend Martin Luther King in Selma, Alabama, for the equality of all persons before the law.

The instant case raises a crucial issue under the Equal Protection Clause of the Fourteenth Amendment, involving the use by an agency of a State of race as a criterion for admission to a State law school, in order to obtain a racial balance of certain minority group members in the student body.

The merit system of admissions to institutions of higher education has been one of the keystones for the success of the Jew and other minorities in America; and therefore the Jewish Rights Council has a particular interest in the preservation of academic excellence as well as equality of opportunity in public education. Being composed of members of an historically persecuted minority, the Jewish Rights Council is especially sensitive to any and all forms of discrimination based upon race, religion, or ethnic background. On the other hand, the Jewish Rights Council firmly believes

that it is extremely important for the preservation of our American way of life, with its concomitant "American dream," that the rights of one group shall not be sacrificed in the name of the promotion of another minority. Therefore, the interest of *Amicus* herein is to oppose the use of racial quota systems in public institutions of higher learning or in any other public function. For it is but a tiny step from the concept of a "racially balanced student body" (opinion below, 507 P.2d 1169, 1184) to the infamous *numerus clausus* of the dark past.

On the other hand, the Jewish Rights Council wishes to make it abundantly clear that there must never be the slightest retreat from the principle of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that a State or its agents may not deny the equal access to a public school (or other facility) to any person on the basis of race, religion, ethnic background or creed. This is the promise of *Brown* from which there must be no retreat anywhere in our Nation.

Consent to Filing

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.

Opinions Below

The opinion of the trial court, Superior Court of the State of Washington, County of King, is not reported. The opinion of the Washington Supreme Court is reported at 507 P.2d 1169 under the style of *DeFunis* v. *Odegaard*, and will be referred to hereinafter as "*DeFunis* below."

Statement of the Case

In 1970, the University of Washington, a state institution, embarked on an "affirmative action" program with a racially preferential standard for admission to its School of Law in place of its previous racially non-discriminatory admissions procedures. In determining who should be offered admission to the Law School, a law school admissions committee utilized a policy whereby "minority" applicants were treated separately with special consideration and more favorably than other applicants to the Law School. *DeFunis* below, 507 P.2d at 1175-6, 1184. As a result of this dual admissions program, over 50% (37/70) of those "minority" students who applied were offered admission [Brief of University as Appellants in Washington State Supreme Court, at p. 9, Proposed Finding 8], whereas less than 20% (275/1601) of all student applicants were offered admission. 507 P. 2d at 1172, 1176. Indeed, some "minority" applicants, with college grades and Law School Admission Test (LSAT) scores so low that they would have been summarily denied admission if they had not been "minority" students, were nonetheless offered admission. 507 P.2d at 1176. Most (36/37) of the "minority" students who were admitted had lower scores than Marco DeFunis, the petitioner herein. *Ibid.* Marco DeFunis is fully qualified and capable of satisfactory attendance at the law school. *Ibid.* But he was not given the same treatment as a "minority" group member applying to the law school, and was rejected for admission.

Summary of Argument

Particularly in the absence of any previous history of invidious discrimination on the basis of race at the University of Washington law school, that school itself introduced the evil of racial criteria for admission when it instituted the challenged dual admissions program in the name of "affirmative action," to the detriment and disparagement of the personal right of Equal Protection of Marco DeFunis under the Fourteenth Amendment. Since racial classifications are vague and dangerous, they bear an extremely heavy burden of justification when implemented by the agency of a State. Therefore, the trial judge was correct in declaring the dual admissions program unconstitutional and in ordering that Marco DeFunis be admitted to the law school, because there is no justification for the dual admissions program.

ARGUMENT

POINT I

A State agency's imposition of racially preferential criteria for admission to a State law school violates the constitutional right of equal protection of law as to those qualified students who were not afforded the same preference, particularly in the absence of previous discrimination or segregation on the basis of race at the law school.

Racial classifications are at once vague and dangerous. For example, the Nazis defined as Jewish any person who had one-quarter or more Jewish blood. Raul Hilberg, *The Destruction of the European Jews,* p. 48 (Quandrangle

Paperback ed., 1967); First Regulation to the Reich Citizenship Law, Nov. 14, 1935. And, in this country's own history of miscegenation laws, the Negro has been variously defined as ranging from "one-eighth or more of African or Negro blood" to any "ascertainable" amount of Negro blood; whereas the American Indian was not considered a colored person in Virginia if he had only one-sixteenth or less of American Indian blood. *Loving* v. *Virginia,* 388 U.S. 1, 5 fn. 4 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184, 187 fn. 6 (1964). Thus, any preferential treatment of "minority" group members by a State faces an initial hurdle of the vice of vagueness, as well as the principle that our constitution requires that state action be "color blind"; *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896, dissent. op.); *Bell* v. *Maryland,* 378 U.S. 226, 288 (1964); and this is true particularly in cases where, as here, the State has not been guilty of invidious past discrimination on the basis of race to identify just what constitutes a "minority" person to be preferred and just what constitutes "other" persons not to be preferred.

The situation in the case at bar, where an agency of the State has introduced race as a criterion for opportunities, where no such evil existed previously, constitutes a distortion of the Constitution. For the Equal Protection Clause of the Constitution protects *all* persons, regardless of the group to which they may happen to belong, "without any regard to any difference of race, color, or of nationality." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886). In its zeal to achieve a "racially balanced student body" (*DeFunis* below, 507 P.2d at 1184), the Washington State law school gave "special consideration" [507 P. 2d at 1184] to

certain "minorities" to the detriment of Marco DeFunis, who was rejected for admission to the law school. Thereby, the State put the burden of the history of past discriminations elsewhere against these "minorities" squarely on the shoulders of DeFunis who had nothing to do with that history.

In exalting "proportionate representation" [507 P.2d at 1184] over equal opportunity based upon achievement and merit, the State created two types of law students, quota-"minority"-law-students and non-quota-"minority"-law-students, instead of just law-students. In so doing, the law school imposed an "implication of inferiority" [Graglia, *Special Admissions of the "Culturally Deprived" to Law School,* 119 Univ. of Penna. L. Rev. 351, 356 (1970)] upon the quota-"minority"-law-students in pursuit of a goal which is dubious at best and at the expense of Equal Protection of Laws for Marco DeFunis. For the Constitution protects the individual rights of "any person" [Amendment XIV] and not any group rights whatsoever. And if the type of preferential admissions policy instituted by the University of Washington is allowed to continue, then this country will soon be faced with two types of law schools, quota-law-schools and non-quota-law-schools, instead of just law-schools. Cf. *Green* v. *County School Board,* 391 U.S. 430, 442 (1968).

In enacting the Civil Rights Act of 1964, Congress made it clear in Title VI, §601, that no individual "person" be "excluded from participation in, * * * or be subject to discrimination under any program or activity receiving financial assistance" [42 U.S.C. 2000d]. Such a national policy

standard of equal protection of law is controlling, especially in the absence of some other previous *de jure* discrimination which might possibly justify color consciousness. See: *Swann* v. *Charlotte-Mecklenburg,* 402 U.S. 1, 17-18 (1971) interpreting the "anti-busing for racial balance" provision of Title IV of the Civil Rights Act of 1964 [42 U.S.C. 2000c-6 (a) (2)] as applicable to every *de facto* segregation case. And *Swann, supra,* made it clear that the need for color conscious plans to remedy the evils of past *de jure* segregation and which promise "realistically to work * * * *now* * * *" are limited in time duration "until it is clear that state-imposed segregation has been completely removed." *Swann, supra,* 402 U.S. 1, 13 (1971). But there was no such state imposed previous history of discrimination by the law school at Washington State, therefore, there was no justification for the denial of Marco DeFunis' equal right to be admitted to that law school. In any event, the reliance of the court below [507 P. 2d at 1179-1181] upon the desegregation cases was clearly misplaced, for in the judicial decrees of those cases no student was denied access to every public school in the affected jurisdiction but was merely shifted from one school to another in the same school district, whereas in the case of DeFunis he was excluded from the only public law school in the State of Washington.

Moreover, in this DeFunis case, there was completely absent any evidence of previous history in which the law school "openly discriminated on the basis of race." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 427 (1971). Nor was there any evidence that the law school had imposed tests "to discriminate because of race." *Griggs, supra,* 401 U.S. at 433. And just as a public school desegregation case, a law school

can carry "only a limited amount of baggage" [*Swann, supra,* 402 U.S. at 24] particularly when the law school is the only one in the State to carry that baggage.

Thus, particularly in the absence of any previous history of *de jure* discrimination at the law school against any "minorities," the denial of equal protection of law to Marco DeFunis is bad enough; but it is compounded by the fact that pre-law "minority" students are thus encouraged in the belief that they need not do well in preparing for law school simply because they will not be required to compete with "other" students for admission to the law school, but instead these "minorities" will only be "directly compared with one another, but * * * not compared to applicants outside of the minority group." *DeFunis* below, 507 P.2d at 1176. Thus, in blindly applying the mandate of the desegregation case of *Green* v. *County School Board,* 391 U.S. 430, 439 (1968) for a plan that "promises realistically to work *now*" [507 P. 2d at 1180], the court below would mandate both the denial of equal protection of the laws to "nonminorities" and the deterioration of academic excellence of "minorities," factors not present in the mere shifting of students between schools in a public school district as in *Green, supra,* 391 U.S. 430. And while preventing meritorious students like DeFunis and others similarly situated from ever becoming lawyers, the dual admissions program at the University of Washington law school thus serves to stigmatize "minority" lawyers later on in life. Prof. Graglia, *supra,* 119 Univ. of Penna. Law Rev., at 356 (1970).

Given the fixed maximum possible size of the first year law class at the University of Washington, the preference

given to certain "minorities" automatically worked out to a "certainly not benign" [507 P. 2d at 1182] policy with respect to Marco DeFunis. For all preferential quota systems violate the fundamental wisdom expressed by the Third Circuit Court of Appeals:

> "* * * American progress in its attempt to eradicate racial discrimination is due largely to the generally held belief that individuals, regardless of their race, creed, religion, sex, or national origin, should be accorded an equal chance to compete for the opportunities society provides—employment, education, and others—on the basis of individual ability. In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place."
>
> *Commonwealth of Pennsylvania* v. *O'Neill*, 41 LW 2162 (3rd Cir, 9/14/72); superseded *en banc*, 473 F. 2d 1029 (3rd Cir, 1973).

For the greatness of America stems from the idea of equal protection of the laws for every individual "person" [Amendment XIV] on an individual basis and not on the basis of quotas, goals for certain "minorities," or other such objectives for any particular group selected by the State. For injustice can never be remedied by injustice.

POINT II

There is no "compelling state interest" in securing proportional representation of certain "minority" group members in the student body of a State law school.

The court below, the Supreme Court of the State of Washington, attempted to justify the infringement of the individual rights of Marco DeFunis to Equal Protection by invoking the "compelling state interest" doctrine. *DeFunis* below, 507 P. 2d at 1182. However, in decision after decision, this Court has made it clear that the Equal Protection Clause guarantees the equality of access "on the graduate school level" of all persons within a given state "of the same educational qualifications." *Brown* v. *Board of Education,* 347 U.S. 483, 492 (1954) citing: *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938); *Sipuel* v. *Board of Regents of University of Oklahoma,* 332 U.S. 631 (1948); *Sweatt* v. *Painter,* 339 U.S. 629 (1950); *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339 U.S. 637 (1950). Yet no case upholds any purported right of "minority" students to secure "proportional representation" [*DeFunis* below, 507 P. 2d at 1184] in any institution of higher learning where only a limited number of seats are available. Indeed, this Court has indicated just the opposite, for this Court itself has supported state action designed to *suppress* picketing for the purpose of securing for "minorities" any "proportional employment." *Hughes* v. *Superior Court of California,* 339 U.S. 460, 464 (1950). For racial preferences in state law school admissions policies cause the same, if not worse, type of "mischief"

[*Hughes, supra*, 339 U.S. at 464] which racial preferences in employment involve. And this Court has itself further warned that nobody can expect to be hired on the job "simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

While the Constitution does not bar *private* schools which "discriminate against students for reasons wholly unrelated to individual merit"; *Norwood* v. *Harrison*, 36 L Ed 2d 723, 733 (June 25, 1973); nevertheless, such discrimination may not receive any "material aid from the State" [*Norwood, supra*, 36 L Ed 2d at 734] even merely by way of the State's lending of textbooks to the pupils in such private schools. Therefore, *a fortiori*, a *State* school such as the University of Washington may not conduct a discriminatory admissions policy whereby certain members of "minority" groups are offered admission ahead of more qualified other applicants.

The dual admissions program which denied DeFunis his equal chance to be accepted to the University of Washington Law School did not satisfy even the test of "rational relationship" to "permissible state objectives" [*Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969)], let alone satisfy the test of "compelling state interest"; for the dual admissions program of itself introduced mischief and evils, because race, religion, color, or ethnic background can have no rational relationship to "educational qualifications" [*Brown, I*, 347 U.S. at 492] of "any person" in our society under the Equal Protection Clause of the Fourteenth Amendment. As stated by this Court some time ago:

"The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. * * * Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948).

Conclusion

Because the introduction of the racially dual admissions program by the University of Washington Law School denied to Marco DeFunis his constitutional right of equal opportunity of access to the Law School, the judgment of the Supreme Court of the State of Washington should be reversed, to enable Mr. DeFunis to complete his law school education.

Respectfully submitted,

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FILED
DEC 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife;
MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONERS' OPENING BRIEF

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UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONERS' OPENING BRIEF

MATTER TO BE REVIEWED

This case involves a review by certiorari of the decision of the Supreme Court of the State of Washington of the case entitled "*Marco DeFunis, et al, v. Charles Odegaard, President of the University of Washington, et al,*" which is reported in 82 Wn.2d 11, 507 P.2d 1169. The Opinion was filed March 8, 1973 and is printed in the Petition for Certiorari, Appendix A-4.

JURISDICTION

This court has jurisdiction to review this matter on certiorari under Title 28, United States Code §1257(3). Petition for Certiorari was filed with the Washington Supreme Court May 24, 1973. This court entered an order granting certiorari on November 19, 1973.

This is a civil action drawing into question the validity of the action of the University of Washington, a public institution receiving federal assistance, whereby preference given on the basis of *race alone* to members of certain so-called "minorities" in competition for limited openings for admission to the law school resulted in the exclusion of petitioner Marco DeFunis, Jr., a better qualified general student.

This case involves the application of §1, Amendment XIV of the United States Constitution, which reads:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state may make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied.)

This case further involves a challenge to the action of the University of Washington as being violative of §2000(d), Title 42, United States Code, which provides:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance."

QUESTIONS PRESENTED FOR REVIEW

The following are the questions presented for review in this case:

A. Whether the Fourteenth Amendment of the United States Constitution prohibiting states from denying persons within their jurisdiction the equal protection of the laws or the deprivation of life, liberty or property without due process of law is violated by an order of the governing authorities of the University of Washington, a state institution, giving preference *solely on the basis of race* to certain persons to the exclusion of others in competition for limited spaces available in the law school.

B. Whether a rule of the University of Washington whereby white students are required, *solely on the basis of race*, to meet different and more stringent criteria than are persons of certain other races in obtaining admission to the law school, violates the federal Civil Rights Act, Title 42, U.S.C. §2000(d), which prohibits discrimination or exclusion on the basis of race from any program or activity receiving federal financial assistance.

STATEMENT OF THE CASE*

The petitioner, Marco DeFunis, Jr. (hereinafter referred to as though he were the sole petitioner), was denied admission to the University of Washington Law School in August of 1971 for the second time in successive years (A. 50) although he had an outstanding academic record, having graduated from the University of Washington on June 19, 1970 Phi Beta Kappa and Magna Cum Laude (A. 47) and with an overall grade average of 3.62 out of a possible 4.00 (A. 47).

*References to documents printed in Appendix to Petition for Certiorari are referenced herein as: "Pet. for Cert. A . . . "

In the fall of 1971, the University of Washington Law School received 1,601 applications for admission to the law school. Under the University's enrollment limitations there were 445 positions allotted to the Law School and of these the number available for the first year class was between 145 and 150 students (A. 48).

The trial court made a finding which has been undisturbed by the Washington Supreme Court (A. 53, Pet. for Cert. A-13, Findings XXIII):

> "That some minority students were admitted to the University of Washington Law School prior to and instead of the plaintiff Marco DeFunis, Jr. with college grades and aptitude test scores so low that had they been white their applications would have been summarily denied."

The trial court further found, and this finding is undisturbed (A. 53, Finding XXIV):

> "That since no more than 150 applicants were to be admitted to the University of Washington School of Law the admission of less qualified students resulted in a denial of places to those better qualified."

In determining who should be admitted and who should be excluded, a law school admissions committee applied a university-wide policy adopted by the Board of Regents whereby members of certain so-called "minority races" were treated separately from and more favorably than general students and were not directly compared to applicants outside the minority group, but were compared only to each other (Pet. for Cert. A-12, R. 457).

The law school has adopted a policy to achieve a greater minority representation among students enrolled and to accomplish this desire the law school gave preference to Afro-Americans, Chicanos, American Indians and Philippine Americans (A. 52).

Out of 70 applicants from such minority races, 44 succeeded in receiving invitations from the University to enter the law school class (A. 52). Of the total of these 44 minority students only six had qualifications higher than the plaintiff and 38 had qualifications lower than the plaintiff (R. 52).

Marco DeFunis, Jr. applied for admission to the University of Washington Law Schol class commencing in the fall of 1970 after graduating from the University of Washington in the spring of 1970. He was not accepted but was placed on the class admissions waiting list and after waiting until late September of 1970, was denied admission to the law school for the fall term beginning in 1970. At that time plaintiff was advised that he might have a better chance of attending law school with the class entering in the fall of 1971 (A. 49).

Thereafter, during the academic year 1970-71, he attended graduate school and took 24 hours of graduate school courses. He received 21 hours of "A" and 3 hours of incomplete while working 36 or more hours per week for the Seattle Park Department (A. 49). He applied for a second time to the University of Washington Law School for admission in the fall of 1971. His admissions credentials included, in addition to the high scholastic records achieved as an undergraduate and his high one-year graduate school record, his score in his most recently conducted law school aptitude test (LSAT) of 668, which is within the *top* 7% of all law school applicants in the nation who had taken the test in the last *three years* (A. 49-50). He had taken the test on two other occasions and the average of scores was 582, which is a very high score. (A. 50). This score should have been around 600 if properly weighted

according to Professor Kummert, Chairman of the Admissions Committee (R. 493, 494).

As a prerequisite to admission, each applicant must have earned a baccalaureate degree and must have taken the Law School Aptitude Test (LSAT) (A. 48). The University had set up a law school admissions committee through subdelegation from the Board of Regents consisting of five faculty members and two students (A. 48, R. 436).

Applicants' records were subjected to a formula whereby the law school aptitude test scores for each applicant were combined with junior/senior average grades to establish a preliminary index called a "Predicted First Year Average" (PFYA) (A. 24, 50).

Students making a PFYA above 77 were almost all automatically admitted to the law school (R. 446, St. 340).

Those with PFYA scores below 74.5 were almost all automatically rejected *unless they were members of what were determined to be "minority" groups* (R. 447, St. 341).

The records of the "minority" students were divided into two piles and all those that were Black were first reviewed by a Black student member of the committee and Professor Geoffrey Crooks, who had been director of the school's Black CLEO program (A. 52-53, R. 458). The remainder of the "minority" files, essentially Chicanos and American Indians and Philippine Americans were reviewed specially by Dean Hunt (R. 458). No special privileges were given to other Asian Americans since a "sufficient number of them could be passed on the same basis as "non-minority" students" (R. 458; St. 352).

Approximately 1,000 applicant files were never reviewed by the committee at all (R. 422, St. 316). Each member

of the committee reviewed approximately 70 files (R. 459). The recommendations of the individual committee members then went to the full committee who voted on acceptance of the recommendations (R. 361). *All of the "minority applicants who were recommended were given invitations to enter the law class.*

Notwithstanding that the cutoff figure on predicted first-year averages (PFYA) below which white students were almost all automatically rejected, was *74.5* (R. 447), "minority" students were actually admitted with some of the following low PFYA scores which, in the order in which they appear in Exhibit A attached to the answers to interrogatories propounded by plaintiffs (A. 37-44), are as follows: 68.05, 71.65, 69.96, 71.97, 70.04, 72.37, 71.58, 74. 70.60, 69.21, 72.19, 71.79, 69.40, 67.71, 72.48, 71.19, 70.14, 70.23, 71.82, 72.70, 71.53, 73.57, 70.73, 73.67, 71.87, 73.84, 70.41.

White students with such low scores were not admitted, yet all of these minorities were given acceptances and none were put on the waiting list (R. 503).

Marco DeFunis, Jr. had a PFYA score of 76.23 (A-50, Pet. for Cert. A-64), under the University's calculations (which omitted consideration of nine hours of "A"), and a score of 76.56 if the nine hours were considered (R. 491).

The material available to the committee for the judgment of the students consisted of a Law School Aptitude Test score (LSAT), a copy of transcripts of all schools and colleges attended, certain letters of recommendation and the students' own statements (R. 494).

There were no personal interviews by the admissions committee (R. 127). The committee had no way of know-

ing from the files or otherwise whether the applicants were affluent or poor (R. 367). All students who were Blacks, American Indians, Chicanos or Philippine Americans were classified "minority" students and *assumed* to be deprived persons, *without any inquiry* (A. 52, Findings XXI), and even though all such "minority" students were college graduates.

The admissions committee had sent letters of acceptance to *275* students as of August 1, 1971, assuming a normal attrition among those invited to attend would reduce the group to produce a class of about 150 (A. 50, Findings XVII). Against the possibility of unusually high attrition among the group of selected applicants, the committee placed approximately *155* applications on a waiting list. Plaintiff was on this waiting list but he was advised of non-acceptance on August 2, 1971 (A 50, Findings XVII). The number of acceptances was increased to 311 by September 15, 1971 (R. 473) but did not include the plaintiff. Excluding the Asian, only *one* minority student out of *31* actually matriculated had a predicted first-year average above plaintiff's (R. 447).

Under a temporary restraining order a place was reserved for plaintiff and after the judgment of the trial court he was entered in the University Law School (A. 54, Findings XXVII). He is currently attending classes pursuant to a stay of the reversal by the Washington Supreme Court.

CONDENSATION OF ARGUMENT

Marco DeFunis, Jr. was deprived of his civil rights. He was denied the equal protection of the laws when his application for entry to a publicly operated university law

school was subjected to criteria different from and less favorable than the criteria applied to the applications of so-called "minority" students whose admission to the law school displaced and excluded him.

Plaintiff in this case was denied entry into the University of Washington Law School by reason of his *race* since persons of another race were given *special privileges* which permitted them to displace him in the competition for the limited number of spaces for entry into the law school. This constituted a violation of the federal Civil Rights Act, 42 U.S.C. 2000(d), which specifically prohibits a denial of benefits under any program receiving federal assistance on the basis of race.

ARGUMENT

A. Special Privileges and Immunities Accorded to Some Students Denied Plaintiff the Equal Protection of the Laws

Plaintiff was entitled to have his application for law school admission judged on *as favorable a basis* and by the *same criteria* as all other applicants. The failure to consider all applicants *on an equal basis* was a denial of the equal protection of the laws, contrary to Section 1, Amendment XIV of the United States Constitution, which reads in its pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or *property* without due process of law, *nor deny to any person* within its jurisdiction the *equal protection of the laws.*" (Emphasis supplied.)

The evidence in this case is undisputed that the "minority" applicants were given preferential treatment and were not even compared with "non-minority" applicants

for the purpose of determining eligibility for acceptance. Professor Kummert testified (R. 459):

> "They were simply not directly compared. We here sought *within the minority category,* those persons who we felt had the highest probability of succeeding in law school." (Emphasis supplied.)

The University, in seeking to accomplish what it termed a racial balance, gave special privileges and immunities to the *Black* students by having their files considered only by a Black Committee member and one in charge of the Black CLEO program and by permitting admissions of such students with scores so low that *had they been White they would have been summarily rejected* (A. 53).

The arbitrary use of race as a means of making certain privileges available is an impermissible classification. This court in the case of *Adickes v. Kress & Co.* (1970), 398 U.S. 144, 26 L. Ed. 2d 142, said:

> *"Few principles of law are more firmly stitched into our constitutional fabric than the proposition that a state may not discriminate against a person because of his race, or the race of his companions . . ."* (Emphasis added)

In this case the evidence shows without contradiction that race alone was the criterion on which the special privileges were granted. No inquiry was made as to whether or not those students granted the special privileges were in fact *disadvantaged* or *poor* or had been *culturally deprived,* but the fact that they were *Black* or *Chicano* or *American Indian* alone gave them special privileges. All were college graduates (A. 48, Findings X).

Any classification by which citizens are treated unequally, in order to be constitutional must be on a rational and permissible basis. The requirements of the equal pro-

tection clause are well summarized by the quotation which the Washington Supreme Court in *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127, adapted from *Washington National Insurance Co. v. Board of Review* (NJ), 64 A.2d 443, as follows:

> "The equal protection clause means that the right of all persons must rest upon the same rule under similar circumstances, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 48 S. Ct. 423, 72 L. Ed. 770 (1928). While the due process and equal protection guarantees are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class. The equal protection of the laws means that no person or class of persons shall be denied the protection of the laws enjoyed by other persons or classes of persons under similar conditions and circumstances, in their lives, liberty, and property, and in the pursuit of happiness, both as respects privileges conferred and burdens imposed. *Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459, 57 St. Ct. 838, 81 L. Ed. 1223 (1937); *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U.S. 183, 57 S. Ct. 139, 81 L. Ed. 109 (1936); *Concordia Fire Insurance Co. v. Illinois*, 292 U.S. 535, 54 S. Ct. 830, 78 L. Ed. 1411 (1934); *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 43 S. Ct. 636, 67 L. Ed. 1112 (1923); *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921); *Smith v. Texas*, 233 U.S. 620, 34 S. Ct. 681, 58 L. Ed. 1129 (1914);

Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U.S. 96, 19 S. Ct. 609, 43 L. Ed. 909 (1899). . . ."

The equal protection clause of the *Federal* Constitution bars all unreasonable preferences.

There is *nothing in the record* to show whether or not *plaintiff* DeFunis or any of the white applicants were in fact *culturally disadvantaged, poor or discriminated against*. No such inquiry was even made the basis for the discrimination that occurred in this case against them. The fact that persons were admitted to the law school through *special privilege* accorded them by reason of their *race*, the trial court found, prevented such persons as the plaintiff from being admitted.

Would anyone contend for an instant that a Black had been given equal protection of the laws if he had been similarly excluded by special privileges accorded to Whites solely by reason of their race?

Cases which indicate that race may be regarded for the purpose of *eliminating* discrimination do not say that the black race may be given *special privileges* not accorded to other races on the same terms.

In *Brown v. Board of Education*, 347 U.S. 483; 98 L. Ed. 873, 38 ALR2d 1180, this court, in holding that segregation of school children was unconstitutional, did so upon the ground that one race was not treated equally.

Equality is the touchstone of the cases construing the Fourteenth Amendment.

The court in the *Brown* case under footnote 5 quotes the following from *Struder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664;

"It ordains that no state shall deprive any person of

> life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the states shall be the same for the black and for the white;* that *all persons whether colored or white, shall stand equal before the laws of the states. . . .*" (Emphasis added.)

Brown v. Board of Education, supra, stands for the proposition that discrimination on the basis of *race* is not permissible. The fact that the *Brown* case rectified discrimination against the colored race is not authority for allowing *special privileges* to the black race that are not available on the same terms to persons of other races.

The cases which sanction mixing of the races in schools, such as *Swan v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 28 L. Ed. 2d 554, do not deal with a comparable situation where one race is given *special privileges* not accorded to the other, but they deal only with the mixing of races. Such a *mixing* of races applies to *all races* alike.

Equality is the result that has to be attained to give equal protection of the law.

The fact that race may be recognized for the purpose of dealing with discrimination against one race does not in any sense mean that adverse *unequal* treatment may be meted out by public authorities on the basis of race.

Equal protection of the laws is written into the Constitution without any racial qualifications.

It does not follow that because in the past there has been discrimination against Negroes, that situation can be rectified by *creating* discrimination against other races.

Depriving plaintiff, who excels in all of the objective

tests, of his right to enter Law School while taking others on the basis of *different standards*, is not treating plaintiff equally or giving him the equal protection of the laws.

Permitting persons of certain races to have their qualifications tested, in the competition for spaces in the law school, by different criteria than apply to all students is according to them special privileges and immunities. This is in violation of the equal protection clause of the Fourteenth Amendment to the Federal Constitution, and for that matter in this case, of Art. I, §12 of the Washington Constitution, which provides:

> "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations.

The mere fact that the 14th Amendment was originally passed to *protect* Negroes does not give Negroes *special privileges* not accorded to persons of other races. Thus in *Cassell v. Texas*, 339 U.S. 282, 74 L. Ed. 839, it was unconstitutional to give Negroes a certain quota on grand juries in proportion to Negroes on the voting list.

In *Hughes v. Superior Court of California*, 339 U.S. 460, 94 L. Ed. 985, this court held that a state could constitutionally prohibit picketing to require the hiring solely of Negro clerks. In so holding the court said:

> "To deny California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, Poles in Buffalo, of Germans in Milwaukee, Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, etc. through the whole gamut of racial and religious concentrations in various cities."

The Washington Supreme Court in sustaining the practice of the University of Washington of giving preferential treatment in admission to the law school to so-called "minority races" stated its position in its opinion set out in the Petition for Certiorari, Page A-21 as follows:

> ". . . the denial of a 'benefit' on the basis of race is not necessarily a *per se* violation of the Fourteenth Amendment, if the racial classification is used in a compensatory way to promote integration."

The Washington Supreme Court thus sanctioned the deprivation of rights of an individual who is to be displaced on the basis of his race (white) to accomplish a racial classification to bring about what it considers a desirable end.

The rights guaranteed by the 14th Amendment are personal to the individual. This court in *Shelley v. Kraemer*, 334 U.S. 1, 22, said:

> "The rights created by the first section of the Fourteenth Amendment are by its terms guaranteed to the individual. The rights established are personal rights."

When DeFunis was denied admission to the law school by the operation of the *policy of preferring Blacks*, he was subjected to discrimination and this was not benign discrimination insofar as he was concerned.

The personal right guaranteed him by the 14th Amendment was that no citizen or class of citizens should have special privileges or immunities which on the same terms did not belong to him.

The proposition that the individual's rights can be sacrificed so flagrantly in the interest of achieving racial balance is contrary to every concept of the guarantee of individual rights.

The facts with regard to discrimination are not obscured in the Opinion of the Washington Supreme Court but are frankly recognized. The Washington court says in its Opinion (Page A-27 Appendix A, Petition for Certiorari):

> "However, the purpose of the racial classification here is to give *special consideration* to those racial minority groups which are underrepresented in the law schools and legal profession, and which cannot secure *proportionate representation* if strictly subjected to the *standardized* mathematical criteria for admission to the law school."

Of course all white students were subjected to the standardized mathematical criteria for admission. It is a special privilege for the selected minorities to be so separately treated. This was not the according of "equal protection" to DeFunis who was excluded by reason of the *special privileges* given to so-called "minorities."

The Washington Supreme Court undertook to justify the discrimination on the grounds that it was an act of classifiication for the accomplishment of an *overriding state interest.*

The proposition that one can be classified out of fundamental constitutional rights is startling.

The doctrine of *overriding state interest* as applied by the court in this case is a new concept and a dangerous one. In this case the *finding of a compelling state interest* has been held to allow the *disregard of the constitutional guarantees* even though there has been *no declaration of such compelling state interest by the Legislature* or by the Constitution.

Making the "selected minorities" a separate class to have the privilege of being judged by more favorable criteria

than the plaintiff was a direct denial of the equal protection of the laws.

If there is a principle that under the Constitution members of the majority race may be denied equal treatment for the benefit of members of minority races, this court has not heretofore enunciated it.

On the contrary, this court has repeatedly stated that the equal protection clause of the 14th Amendment is applicable to *all* races alike. In *Brown v. Board of Education,* 374 U.S. 483, 98 L. Ed. 873, this court, under Footnote 5, quotes the following from *Struder v. West Virginia,* 100 U.S. 303, 25 L. Ed. 664:

> "It ordains that no state shall deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that *the law in the states shall be the same for the black and for the white; that all persons whether colored or white, shall stand equal before the laws of the states* . . ." (Emphasis supplied.)

For the person whose rights are sacrified to achieve the so-called "overriding state interest" it is little compensation that in the philosophy of someone a social end is being promoted.

There is involved in this case a matter as fundamental as whether the individual constitutional rights of a citizen are so fragile that they can be swept aside whenever a divided state court choses to call an objective an "overriding state interest."

How does an objective become an overriding state interest? Is it such simply because a majority of a divided court gives it that name? Is it a matter of semantics whether the constitutional protections are inviolate?

Surely a state interest to be so overriding as to overwhelm the guarantees of the Constitution must be backed by some determination of some legislative or constitutional-making process or by necessary implication from constitutional responsibilities to preserve the nation or ward off danger.

We submit that an overriding state interest is not established by merely showing that there is a desirable result to be obtained.

This court has held that a reasonable relationship to a desirable state interest is not sufficient to justify taking away guaranteed constitutional rights but something extreme and compelling and constituting a clear and present danger is necessary to meet the test when we are speaking of depriving citizens of rights guaranteed under the Constitution. This principle was stated by this court in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965:

> "We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v. Collins*, 323 U.S. 516, 530, 89 L. Ed. 430, 440, 65 S. Ct. 315. No such abuse or danger has been advanced in the present case."

The right to classify is an attribute of governmental authority up to the point that it begins to encroach upon the rights of citizens guaranteed by the Constitution. Whenever a classification is based upon race it is suspect. *Loving v. Virginia*, 388 U.S. 1, 18 L. Ed. 2d 1010. That

kind of classification must meet a test much greater than merely whether it is reasonably related to legitimate public purposes. If the citizen is to be deprived of a guaranteed right it must arise from a compelling or overriding reason, not merely because it is related to a policy that by a majority of the court is deemed desirable.

It could scarcely be contended that failure to accomplish the objective of increasing the number of minority lawyers, regardless of qualifications, threatens the public safety or welfare.

While the equal protection clause does not require in every case an absolute mathematical equality in the application of the laws, this court on numerous occasions has reiterated the fact that it takes an *overwhelming necessity* to permit a person to be classified out of his constitutional rights. Such necessity is not established lightly.

In *Thomas v. Collins*, 323 U.S. 516, 89 L. Ed. 430, this court discusses the type of necessity that will permit a citizen to be classified out of his rights:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider v. Irvington*, 408 U.S. 147, 84 L. Ed. 155, 60 S. Ct. 146; *Cantwell v. Connecticut*, 310 U.S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 ALR 1352; *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United*

States v. Carolene Products Co., 304 U.S. 144, 152, 153, 82 L. Ed. 1234, 1241, 1242, 58 S. Ct. 778.

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but *by clear and present danger*. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." (Emphasis ours)

It will be noted from the foregoing quotation that the court points out that the rational connection between a remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice where an individual is to be deprived of a guaranteed constitutional right.

The philosophy of the Washington court to the effect that an individual can be deprived of his constitutional right to equal protection and equal treatment because of what it calls "overriding state necessity" is comparable to a philosophy that would allow the uncompensated taking of private property for public use because a public purpose might be served.

This philosophy is too dangerous to countenance.

If equal protection of the laws can be denied to a citizen on the basis of an overriding state interest, then with equal facility upon the finding of an "overriding state interest," all other rights guaranteed by the Declaration of Rights in our Constitution can be disregarded and persons can be deprived of life, liberty and property without due process of law (Amendment XIV §1). They can be deprived of the right to exercise religious freedom (Amendment I); they can be subjected to unreasonable searches and seiz-

ures (Amendment IV); they can be deprived of the right of habeas corpus (Article I, §9, ¶2); they can be deprived of the right to petition and assemble (Amendment I); and they can be subjected to cruel and unusual punishment (Amendment VIII).

We submit that a state court merely by using some magic words such as "overriding state interest" should not be permitted by this court to disregard the positive protection of the Constitution that no person shall be deprived of life, liberty or property without due process of law or be denied the equal protection of the laws.

The determination by the Washington Supreme Court that there is an overriding state necessity to increase the number of Black lawyers before the bar is a philosophical determination made by a majority of the court and is by no means concurred in by all of the best thinkers and writers on the subjects of social science or legal education. In this connection we cite the article in 119 University of Pennsylvania Law Review 351 (1970) by Professor Lino A. Graglia, from which we extract and quote:

> "I do not know that Negroes do or should prefer that their attorneys be Negroes, or that Negro attorneys can more effectively represent their interests. To assume, accept, and even urge, otherwise seems to me to verge upon racism, to use that most common and forceful of epithets. Achievement of proportional representation of different groups is not a proper goal of higher education. It seems a small step from this to the argument (not unknown in our past) that certain groups are overrepresented in various professions.
>
> "Society needs the best lawyers it can get, regardless of racial or ethnic derivation. The need of culturally or economically disadvantaged groups is the same: the best representation they can get. This representation can and does come from all races. Similarly, effective

leadership both in democratic ideal and in fact does not require racial identity of the leader and the group, as Senator Brooke of Massachusetts demonstrates. Nor are the problems of poverty and of racial and ethnic discrimination solely or even distinctively matters of concern for members of minority groups; they are inescapably the most important problems for us all, and particularly for all lawyers."

This well reasoned article goes on to say:

It is further argued that minority group lawyers are important beyond their individual merits because of their visibility—they are living evidence that minority group members can advance and participate in all levels of our society. I agree, but only insofar as the minority group lawyers are effective, able lawyers, the equals of their 'majority group' peers.

"The abstract question whether Negroes can compete and succeed in this country has, I believe, been answered in the affirmative; there are few positions short of President and Vice President that Negroes have never attained. At the very highest level of the legal profession, the United States Supreme Court, Negroes are 'represented' almost exactly in proportion to their share of the population.

"Ineffective minority group lawyers will disserve the cause of minority group equality and recognition. In the short run disserving the interests of their clients, they will in the long run reinforce stereotypes of incompetence. It will soon come to be believed that to get a *real* lawyer he had better be very white.

"The point is important on a much wider scale: one of the most serious disservices done by lowered academic standards for Negroes in institutions of higher learning is to call into question the legitimacy of every Negro graduate. Neither individuals nor institutions should become accustomed to believe that Negroes cannot meet usual standards."

For a somewhat similar view see "Equality in an Unequal World" by John Kaplan, Professor of Law, Stanford University, 61 Northwestern Law Review 363.

We do not mean to imply that what we have just quoted is the unanimous opinion of scholars, but rather to point out that the very objective which the Washington Supreme Court said to be an "overriding state interest" is extremely controversial.

The determination of the necessity for achieving such an end is actually a *policy decision* with respect to which courts are ill-equipped to deal.

The determination by the Washington Supreme Court that the need to increase the number of Black lawyers was an overriding state interest was *not based upon testimony* in the case but was simply the philosophical conclusion of a majority of the divided court. The result was not because of judicial precedent establishing such a purpose to be overriding and there is respectable authority from writers on the subject that the giving of special preferences to some races to the exclusion of others is a *divisive* rather than a unifying social force. We quote the following from the article by Professor John Kaplan, Professor of Law, Stanford University, entitled "Equality in an Unequal World," 61 Northwestern Law Review 363, 375:

> "More important even than the abstract justice of such preference is the effect it would have on American society. Regardless of whether a sophisticated analysis can show that the Negro is entitled to job preference at the expense of the rest of the underclass, it is most unlikely that the Negroes' competitors will agree. Quite the contrary, it is clear that any attempt to secure preferential treatment for Negroes in the employment area will be extremely divisive.
>
> In addition to the previously-mentioned groups, whose economic well-being is not perceptibly better than the Negro's, those most affected by job preference for the Negro would be the second generation

Americans and the poor whites who have most bitterly resented his march toward equality. A major factor which has tended to weaken this opposition is our ethic that men are entitled to be treated on their individual worth alone.

It is one thing to tell those in job competition with the Negro that because of this principle they can no longer enjoy an advantage which they (or, more likely, others) had previously enjoyed; it is very different to tell them that this principle must now be modified to put them at a disadvantage. Those who will feel the pinch most strongly have not only not benefited from the exploitation of Negroes, but may in fact have been harmed by it—if only because this caused a depression in their own wage rates.

In terms of education and training, as well as any other measurable standard, the members of the rest of the underclass are no better off than most Negroes; to attempt to give Negroes formal legal preference over them will only exacerbate what is already a serious source of tension. It has been argued that the poor Negro can move forward only by creating new alliances with poor whites. It is hard to think of a better way than preferences to prevent this."

We cite the foregoing as an illustration of the fact that there is no unanimity among profound thinkers as to the beneficent results of displacing whites by giving preferences to Blacks.

The basis upon which the Washington Supreme Court has decided this case on a doctrine of overriding state interest is so dangerous that this court should not allow it to stand.

The expressive statement of Mr. Justice Jackson in his dissent in *Koramatsu v. United States*, 323 U.S. 214 (1944) well states the case against expanding the doctrine of overriding state interest:

> "Much is said of the danger of liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding military commander may revoke it all. But once a judicial opinion rationalizes such an order to show it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply into our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limits of its logic.'"

There is no evidence in this case that DeFunis was guilty of any past discrimination against Blacks or that he was in any way responsible for having placed them in any position of inequality.

Past inequities are not remedied by creating new inequities to be visited upon individuals in the non-minority groups.

This is not a case where the court found that the disregard of a certain section of the Constitution was necessary to give effect to another section. It was not a case where the legislature had adopted a policy to effectuate a constitutional mandate. It was not a case where the public safety, health or welfare is jeopardized to bring it within

the police powers. It is not a case made necessary by the exercise of the war powers. It is simply an application of a divided court's own determination that a certain result is in the interest of the state.

The Washington court has called it "overriding" or "compelling" but in effect the court by the doctrine applied in this case would set itself up as a super-legislature, overriding the Constitution when a result the majority of the court considers desirable is to be achieved.

The doctrine of compelling state interest has heretofore generally been applied not to set aside constitutional guarantees but rather to place limitation on laws or state acts otherwise authorized if the constitutional guarantees are jeopardized.

In *Dunn v. Blumstein*, 405 U.S. 330, 31 L.Ed.2d 274, this court said that to determine whether a law violates the equal protection clause the court must look to three things: (1) the character of the classifiication in question, (2) the individual interests affected by the classifiication and (3) the governmental interests asserted in support of the classifiication.

It will be noted that the government interest is not the only thing taken into consideration. In addition to considering the character the *individual interests* affected by the classification. In the present case, if the establishment of a class of minority citizens who can have the privilege of entering the University Law School on more favorable terms than citizens generally is accepted, then the interests of the individual who is excluded have been disregarded and swept away.

In the cases where the doctrine of compelling state interest has heretofore been used, it has generally been used as

a shield to protect the citizen against deprivation of his constitutionally guaranteed rights, not as a sword to take away these rights.

In this case the Washington Supreme Court undertook to use "compelling state interest" as a means of taking away DeFunis' rights to treatment equal to that accorded the selected minority groups.

The doctrine of compelling state interest is not one to dispense easily with constitutional guarantees of citizens but comes into play in *extreme* cases only and where a clear and present danger threatens.

In this case there is no evidence that there exists any such grave abuse which would justify depriving DeFunis of consideration as favorable as that given to the selected so-called "minority races."

B. The Exclusion of DeFunis on the Ground of Race Was a Violation of the Federal Civil Rights Act

The University of Washington is heavily funded by federal assistance of various kinds. These include the federally funded CLEO program referred to from time to time in this case (R. 505, Finding XXII A 52), the Upward Bound program (R. 333), the land grants authorized by § 17 of the Washington State Enabling Act, 25 Stat. Ch. 180, p. 676, and various other educational and research grants.

As a federally assisted institution the University falls directly within the terms of Title 42 U.S.C., § 2000(d), which provides:

> "No person in the United States shall on the ground of *race*, color or national origin be *excluded from* participation in, be denied the benefits of, or be subjected to *discrimination* under any program or activity receiving federal financial assistance." (Emphasis supplied.)

DeFunis was *excluded from* the University of Washington Law School by reason of his race since persons of other races were on the ground of race alone given special privileges which permitted them to displace him in the competition for the limited spaces for entry into the law school.

The statute quoted is a part of the Federal Civil Rights Act. That act is not written in terms of its beneficiaries being Black, but applies to *all races* and specifically prohibits a denial of benefits of any program receiving federal assistance on the *ground of race.*

Since the law school does receive federal assistance and plaintiff has been denied the benefit of having his application considered on terms as favorable as those of members of certain other races, the Federal Civil Rights Act has been directly violated by the University in this case and DeFunis has been *deprived of his civil rights.*

The acceptance of federal funds by the University bound the University to compliance with the section of the Civil Rights Act quoted. *Bossier Perry School Board v. Lemon,* 370 F.2d 847, Cert. Den. 388 U.S. 911, 18 L.Ed.2d 1350.

The Civil Rights Act is available to *all* races, not just to Blacks. In *General Presbyterian Church v. Black Liberation Front* (1969), 303 F. Supp. 894, the court says:

> "While the Court recognizes the fact that these statutes were passed primarily to insure the rights of non-white Americans, nothing in the statutes limit their application to cases where the civil rights of non-whites are being violated. Indeed, it would be unfair to deprive white Americans of the benefit of these sections when their constitutionally-protected rights are being violated. In two recent cases dealing with related issues, the Supreme Court said:

> " 'We think that history leaves no doubt that, if we are to give [the law] the scope that its origins dictate, we must accord it a sweep as broad as its language.' *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437, 88 S.Ct. 2186, 2202, 20 L.Ed.2d 1189 (1968); *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).
>
> "These statutes have been interpreted to apply to discrimination against whites as well as those of other races. *Kentucky v. Powers*, 139 F. 452 (Cir.Ct.L.D. Ky. 1905)."

The denial to the plaintiff of the right to have his application considered on a basis as favorable as persons of other races violated his civil rights.

The exclusion of DeFunis from the law school on the ground of race was a direct violation of the Federal Civil Rights Act, Title 42 U.S.C., § 2000(d), and was a violation of his right to equal protection of the laws under the 14th Amendment to the Federal Constitution.

CONCLUSION

Marco DeFunis, Jr. was denied the equal protection of the laws in violation of § 1 of the 14th Amendment of the United States Constitution and was excluded from the benefits of a federally assisted program on the basis of race.

The decision of the Washington Supreme Court should be reversed and the judgment of the trial court which ordered the University of Washington Law School to accept DeFunis as a student should be reinstated.

Respectfully submitted,

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SUPREME COURT, U. S.

JAN 2 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Appellants,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,

Appellees.

BRIEF OF ADVOCATE SOCIETY, AMERICAN JEWISH COMMITTEE, JOINT CIVIC COMMITTEE OF ITALIAN AMERICANS AND UNICO NATIONAL AS *AMICI CURIAE*

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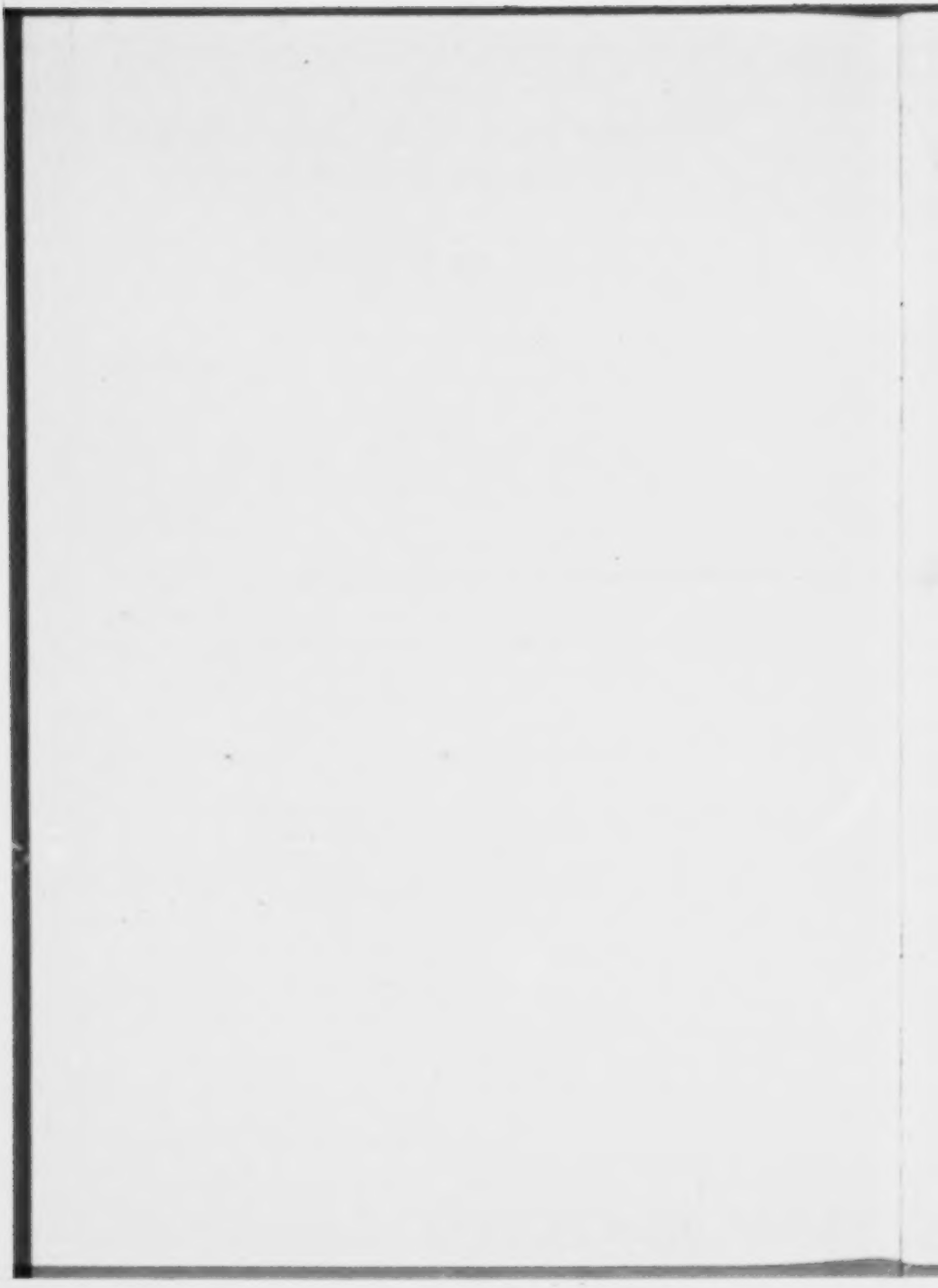

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Appellants,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*,

Appellees.

BRIEF OF ADVOCATE SOCIETY, AMERICAN JEWISH COMMITTEE, JOINT CIVIC COMMITTEE OF ITALIAN AMERICANS AND UNICO NATIONAL AS *AMICI CURIAE*

Interest of the *Amici*

This brief is submitted with the consent of counsel for the parties on behalf of the following organizations:

Advocate Society
American Jewish Committee
Joint Civic Committee of Italian Americans
UNICO National

The Advocate Society is composed of 300 Polish-American lawyers from the greater Chicago area, and is the largest group of Polish-American lawyers in the United States. Its goals are to promote the welfare of its members and establish proper relationships with the public, promote progress of the law and the administration of justice, and maintain the honor and dignity of the legal profession.

The American Jewish Committee is a national organization of approximately 40,000 members which was founded in 1906 for the purpose of protecting the civil and religious rights of Jews. It has always been the conviction of this organization that the security and the constitutional rights of American Jews can best be protected by helping to preserve the security and the constitutional rights of all Americans, irrespective of race, creed or national origin. For this reason the American Jewish Committee has vigorously supported the extension of equal educational opportunity to all individuals. Consequently it has filed briefs as *amicus curiae* in support of this concept in numerous cases before this Court, including *Brown* v. *Board of Education,* 347 U.S. 483 (1954), *Keyes* v. *School District No. 1,* 37 L Ed 2d 548 (1973) and, most recently, *Lau* v. *Nichols,* 472 F. 2d 909 (9th Cir. 1973).

The Joint Civic Committee of Italian Americans is an "umbrella" organization bringing together the varied social, fraternal, benevolent and service organizations of Italian-Americans within the greater metropolitan Chicago area. It was founded 20 years ago to coordinate the various activities of the many groups that subscribe to its goal of eliminating bias and discrimination against Italian-Americans.

UNICO National is a service organization of Italian-Americans with chapters throughout the United States. UNICO National represents approximately 50,000 people and has as its objectives to foster, encourage and promote the Italian heritage and culture as a creative force for the good of all America and to enhance the interest of each member in the public welfare of his community. UNICO National is 50 years old and has been active in the areas of scholarship, aid to the physically handicapped and the fostering of research in the afflictions of mental health.

Opinion Below

The opinion of the Supreme Court of Washington is reported in 82 Wn. 2d 11, 507 P. 2d 1169.

Statement of the Case

Marco De Funis applied for admission to the Law School of the University of Washington in the class which was to commence in September of 1971. He was one of 1,601 applicants who were competing for approximately 150 openings in that class.

Persons seeking admission must have earned an undergraduate degree and have taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, N.J. To rank the applicants, a formula had been devised, based on past experience at the law school, that combined undergraduate grade point average with LSAT score to produce a number called Predicted First-Year Average (PFYA), which has been validated as an accurate gauge of law school performance.

Although an applicant's PFYA clearly was a major factor in the Admission Committee's process of selection (along with such personal qualities as background, apparent motivation and experience) and those below a PFYA score of 74.5 almost always were rejected, all applicants from certain minority groups (black, Chicano, American Indian, Philippine American) received special consideration, irrespective of their PFYA.

Applicants who achieved a PFYA of 77 or better generally were accepted almost automatically. Those non-

minority applicants who scored between 76.99 and 74.5 were evaluated separately from minority applicants in the identical scoring range, as well as from minority applicants who scored below 74.5. De Funis, a non-minority applicant and a Phi Beta Kappa, *magna cum laude* graduate of the University, scored 76.23. He was denied admission.

De Funis filed suit in the Superior Court of Washington in which he charged that he was wrongfully denied admission because other applicants whose PFYA was lower than his own were accepted nevertheless because of their race. After a trial, the Superior Court held that the University had in fact discriminated against De Funis on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment and ordered the University to enroll him. The court found that 44 applicants from the stipulated minority categories had been offered admission to the Law School, the great majority of whom had a lower PFYA than De Funis and some of whom, had they been white, would have been summarily rejected.

While the University enrolled De Funis in compliance with the Superior Court order, it appealed the trial court decision to the Supreme Court of Washington. On March 8, 1973, that court in a 6-2 decision reversed the Superior Court ruling and upheld the right of the University to consider race as a factor in selecting students for its Law School. On June 5, 1973, enforcement of the judgment of the Supreme Court of Washington was stayed by Mr. Justice Douglas pending the disposition of an appeal or petition for a writ of certiorari in this Court. On November 19, 1973, this Court agreed to review the case.

The Question Presented

Whether the Equal Protection Clause of the Fourteenth Amendment is violated by the action of a state university law school in granting preferential admission to applicants from certain groups on the basis of race.

Constitutional Provision

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Summary of Argument

I. There has been a vast array of cases in which this Court has struck down state action supporting racial discrimination as violative of the Equal Protection Clause of the Fourteenth Amendment. Among these are decisions which have imposed "a heavy burden of justification" on state establishment of classifications based on race. Where racial classifications have been either sustained, permitted to stand or mandated on the ground of "compelling state interest," such classifications ordinarily had been designed to remedy proven preexistent racial discrimination, as well as to accomplish this objective without discriminating invidiously against others.

The right to equal protection has been declared to be protective of individuals of every race, rather than of

groups of any race. Moreover, it is not the intent of the state's action in this area which is controlling, but rather its effect.

A racial quota is no less a quota merely because it is not identified as such. Quotas based on race are inherently discriminatory and, accordingly, have been proscribed as unlawful by this Court. The Court has also construed the enactment of the Civil Rights Act of 1964 to reflect the intent of Congress to bar "discriminatory preference for any group, minority or majority, * * *." For these reasons, racially preferential admission to a state educational institution violates the Equal Protection Clause.

II. Although preferential admission to professional schools on the basis of race has been prevalent, and the reasons for it we understand, it is nonetheless an unwise practice. Necessarily it penalizes innocent individuals. Neither is it equitable in favoring on the basis of race some of those who are disadvantaged over others who may be equally or even more disadvantaged.

Since disadvantaged minority persons need the best possible legal representation, they are ill-served by a system of law school admissions which is conducive to a lowering of legal professional standards. Preferential admission may well engender preferential grading too, with concomitant resentment by those who are not among its beneficiaries. Further, those disadvantaged minority students who succeed strictly on merit nevertheless may be stigmatized unjustly as beneficiaries of a double standard. The disproportionately high rates of failure on bar examinations by black students who have succeeded in obtaining

law degrees may be symptomatic of preferential grading in law schools based on race.

A number of black spokesmen have decried the erosion of standards implicit in racially based preferential treatment as being, in the long run, detrimental to the best interests of the black community.

III. Eradicating racial discrimination, in and of itself, will not suffice to overcome the consequences of the acute deprivations which have been imposed for so long on people of color in America. There is an urgent need for legitimate affirmative action programs to increase minority enrollment in professional schools, but which do not simultaneously violate the Constitution or create discrimination in reverse.

Disadvantaged minority students with professional career potentialities must be identified at the high school and junior high school levels and rendered all possible assistance to enable them to fulfill their potentialities. Further assistance is necessary on the college level, through measures such as open enrollment in public colleges, financial aid and special remedial education programs.

In approaching the professional school level, a success model has been provided by the Council on Legal Education Opportunity (CLEO) pre-admission summer institutes. CLEO has provided the necessary orientation, remediation and financial stipends to enable hundreds of disadvantaged minority students to become practicing lawyers. It deserves to be replicated extensively. Similar special remedial pre-admission programs should be undertaken by professional schools themselves.

I

Preferential admission to a state educational institution on the basis of race contravenes the Equal Protection Clause of the Fourteenth Amendment.

A. The Burden of Racial Classifications and Individual Rights

Discrimination because of race by any state agency is in violation of the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970); *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Further, this Court has held consistently that any classifications by a state based upon race, whether in whole or in part, are inherently suspect. In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964), which dealt with a cohabitation statute which imposed a greater penalty when the participants were members of different races, the Court said:

> But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect." *Bolling* v. *Sharpe*, 347 US 497, 499, 98 L ed 884, 886, 74 S Ct 693, and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 US 214, 216, 89 L ed 194, 198, 65 S Ct 193; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States*, 320 US 81, 100, 87 L ed

1774, 1786, 63 S Ct 1375. Thus it is that racial classifications have been held invalid in a variety of contexts. See, e.g., *Virginia Board of Elections* v. *Hamm*, 379 US 19, 13 L ed 2d 91, 85 S Ct 157 (designation of race in voting and property records); *Anderson* v. *Martin*, 375 US 399, 11 L ed 2d 430, 84 S Ct 454 (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis*, 373 US 526, 10 L ed 2d 529, 83 S Ct 1314 (segregation in public parks and playgrounds); *Brown* v. *Board of Education*, 349 US 294, 99 L ed 1083, 75 S Ct 753 (segregation in public schools). (at 191-192)

In invalidating the statute there in question, the Court in *McLaughlin* added that an enactment based on a racial classification, "• • • even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy" (at 196). Accord, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Frontiero* v. *Richardson*, 36 L ed 2d 583 (1973).

While historically the impetus for the adoption of the Fourteenth Amendment was the determination to bring to Negroes full rights of citizenship, there can be no dispute that it applies with equal force to discrimination by a state against members of any racial or ethnic group. *Oyama* v. *California*, 332 U.S. 633 (1948); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). Hence the Equal Protection Clause perforce applies to discrimination against persons because they are not black or because they are white.

It is well settled also that the right to equal protection granted by the Fourteenth Amendment is an individual

and personal one, not a group right. For example, in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court said:

> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the Court may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. (at 22)

Other decisions of this Court which have stressed the personal nature of the rights guaranteed by the Equal Protection Clause are *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950); *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637, 642 (1950); and *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151, 161 (1914).

If a given racial group had the constitutional right to membership as a group in the student body of a state institution, then it might be contended that individuals of a different racial background would have to be refused to enable that group to achieve proportional representation in such student body, artificially imposed in that very manner. Although group interests of different racial groups in this country may well be legitimate, it follows from the decisions cited above that there is no such thing as a group right under the Fourteenth Amendment. That Amendment guarantees rights to the individual and to the individual only. If an individual is denied admission to a state institution even though he is better qualified than others who have been accepted, and if the denial is due to the fact that

he is or is not a member of a particular racial or ethnic group, his personal and individual right to be free from discrimination has been infringed. The fact that members of other groups may have suffered discrimination in the past is no justification for present discrimination against him.

In the instant case, the appellant De Funis has been deprived of his constitutional right to be considered for admission to the Law School as an individual applicant, and without regard to his race. Had De Funis been black, Chicano, American Indian or Philippine American, under the two-track admission system established by the Law School, plainly he would have been admitted. Yet there was no judicial finding whatever in the court below of past discrimination by the Law School against any of the above named groups which, it is conceded, were marked for preferential consideration in the competition for admission.

Nor does it matter one iota that there was no intent on the part of the Law School to discriminate against the petitioner on the basis of race. It is the effect that matters. "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith." *Burton* v. *Wilmington Parking Authority, supra,* at 725. See also *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971).

The Supreme Court of Washington has found "the state interest in eliminating racial imbalance within public legal education to be compelling." 507 P. 2d at 182. It found also that "the educational interest of the state in producing a racially balanced student body at the law school is compelling," and that "the shortage of minority attorneys—

and, consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest." 507 P. 2d at 1184. This, in essence, is the rationale for the decision below which upholds this particular classification based on race.

In other cases heretofore, which are still in good standing,[1] where this Court has either upheld, let stand or mandated a classification based on race, there has been a prerequisite, i.e., a finding of prior discrimination based on race, which the classification was expressly designed to remedy. Moreover, the remedy in such cases did not clearly deprive others of any rights guaranteed them by the Constitution, as it does in the instant case. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir.), *cert. denied*, 404 U.S. 584 (1971); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

For example, *Carter, supra*, which is cited in the decision below, is readily distinguishable from the instant case. There the preference granted, based on a specific finding of racial discrimination by the Minneapolis Fire Department (which had never hired a single black), was expressly made a temporary one limited to the hiring of 20 minority

1. The Japanese relocation cases, in which the Court sustained a racial classification by finding that national security constituted a compelling state interest, can scarcely be relied upon to buttress the decision below. *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

persons. Subsequently, the job selection procedure was to be non-preferential and non-discriminatory. In the instant case, no such limits have been imposed and, more importantly, minority persons had not been excluded from the Law School. Further, in *Carter* the court found no evidence that the qualification test for appointment to the fire department had been validated as an accurate gauge of the examinees' ability to do the job. Thus, even absent the test, there was no proof that less qualified minority applicants would be hired in place of better qualified whites. In the instant case, it is acknowledged that better qualified whites have in fact been rejected in favor of less qualified applicants from the stipulated minority groups.

In one sense, the instant case is one of first impression. From a different perspective, however, its problem has been encountered before, albeit in reverse in terms of race. Whereas in *Sweatt* v. *Painter, supra,* the Court ordered the black plaintiff admitted to the University of Texas School of Law not because of unconstitutional discrimination but because the defendant failed to prove the availability to the plaintiff of separate but equal facilities,[2] in *Florida ex rel. Hawkins* v. *Board of Control,* 350 U.S. 413 (1956), the Court in a *per curiam* decision ordered the black plaintiff, who was denied admission solely because of race, admitted to the University of Florida School of Law "under the rules and regulations applicable to other qualified applicants" (at 414), even though a black law school was then available to him at Florida A. & M. University. This, we believe, is the law today and, indeed, should be the law.

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2. 339 U.S. 629, 633 (1950).

B. Quotas and Reverse Discrimination

The Law School's plan to bring about a "reasonable representation" of students from the stipulated minority groups has not been called a quota. Since "quota" is a painful word to many people because it is reminiscent of past injustices, it is often disguised by a euphemism such as "ratio" or "reasonable representation." Many a *de facto* quota today is characterized as something else.[3] While it is true that in the instant case there was no fixed number or percentage of the specified minority group students to be admitted, the element of flexibility does not negate the fact of a sought-after rough proportionality (which appears to be considerably higher than their proportions in the area population at large). Whether fixed or rough, and however labeled, floor quotas for certain groups inevitably must signify ceiling quotas for other groups. The resulting injustice is palpable. It need not be elaborated.

The attitude of this Court toward the quota concept was reflected in its unanimous decision, with Mr. Justice Douglas not taking part, in *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950). In that case, which presented the question whether the Supreme Court of California had the right to enjoin a union from picketing which was conducted for the purpose of forcing a quota system upon an employer, this Court noted in its opinion, delivered by Mr. Justice

3. See, e.g., Raab, *Quotas by Any Other Name*, Commentary, January 1972.

"One of the marks of a free society is emphasis on achieved status over ascribed status, the ascendancy of performance over ancestry. * * * Achieved status is that aspect of democracy which represents the primacy of the individual, and of individual freedom." *Group Life in America, A Task Force Report*, The American Jewish Committee (1972), pp. 85-86.

Frankfurter, that the California court had held "that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner." (at 462). The Court also quoted from the California decision that part explaining why a quota system is discriminatory, i.e. that those seeking to set up a quota system "would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but rather, on membership in a particular race." (at 463-464). The Court went on to say:

> To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. (at 464)

In affirming the California Supreme Court decision granting the injunction against the picketing, this Court held, in effect, that the picketing was unlawful because its purpose, to establish a quota based on race, was unlawful. In Fourteenth Amendment terms, any state action in support of a racial quota system inevitably clashes with the Equal Protection Clause.

C. Congressional Intent and Discriminatory Preference

In construing Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e-2000e-15) in *Griggs* v. *Duke Power Co., supra,* which held that job qualification standards must be performance related, this Court said unanimously, with Mr. Justice Brennan not participating:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. (at 430, 431)

Although *Griggs,* of course, dealt with job discrimination rather than educational discrimination, the philosophy which undergirds it cannot be reconciled with the decision below in the instant case. In enacting Section 703(j) of Title VII (42 U.S.C. §2000e-2(j), Congress abjured preferential treatment as a remedy for racial imbalance in employment. If preferential treatment based on race is deemed to be an improper remedy for an employment situation involving a proven history of racial discrimination, as in *Griggs, a fortiori* it is an improper remedy for an educational situation, closely related to employment opportunity, where there is no proof of such a history. *Griggs,* therefore, is highly apposite to *DeFunis.*

In his dissenting opinion in the instant case, Chief Justice Hale of the Supreme Court of Washington cited with approval the employment discrimination ruling in *Anderson* v. *San Francisco Unified School District,* 357 F.Supp. 248 (N.D. Cal. 1972), in which the court rejected a racially preferential scheme for promotion of public school administrators. In so doing, the court observed:

> Preferential treatment under the guise of "affirmative action" is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some? (at 249)

The decision in *Anderson, supra,* was grounded in part on Title VI, Section 601, of the Civil Rights Act of 1964 (42 U.S.C. §2000d) in which Congress, of course, made clear its intent to bar discrimination against any person on the basis of race "under any program or activity receiving Federal financial assistance."

II

Preferential admission to a professional school on the basis of race is unsound social policy.

There appears to be little question but that in recent years preferential admission to professional schools of certain disadvantaged minority group applicants has been a reality. With regard to law schools, in the spring of 1970 an entire issue of the University of Toledo Law Review

addressed the subject of "Disadvantaged Students and Legal Education—Programs for Affirmative Action." Among the authors of the various articles in this survey, who expressed divergent opinions on the subject, there was broad consensus, however, that preferential admission to law schools was a fact of life. As noted by one professor, who is basically sympathetic to such admission practices:

> First, there is now ample evidence that institutions of higher learning, and law schools in particular, do give such special consideration to applications from minority group members. Students specially admitted because of race or ethnic status in a sense "displace" white or Anglo students with objectively more impressive paper records and higher standardized test scores. Moreover, minority students are almost certain to need a level of financial assistance that has rarely been given to the most promising non-minority students—with the result that monetary needs of many students who would formerly have received generous scholarships will now go unmet.[4]

Quite apart from the critical issue of constitutionality, and it should be noted that the instant case is a prime example of how social policy factors may influence ideas about constitutionality, there are a number of reasons why racially discriminatory classifications in professional school admission practices are unsound.[5] The most important of these is their manifest unfairness. Ineluctably they penalize other innocent individuals who bear no personal re-

4. O'Neil, *"Preferential Admissions: Equalizing Access to Legal Education,"* 2-3 Toledo Law Review 283 (1970).

5. "* * * the ultimate question we must confront is not whether preferential admissions is constitutional, but the antecedent question of whether it is prudent * * *." Summers, *"Preferential Admissions: An Unreal Solution to a Real Problem,"* 2-3 Toledo Law Review 377, 379 (1970).

sponsibility for historic wrongdoing. Moreover, while assuredly most people of color in this country are culturally "disadvantaged", not all are, nor are all whites by any stretch of the imagination properly to be considered "advantaged." Rarely if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment. Nor has any favoritism been bestowed on members of other ethnic groups which credibly can claim to have been subjected to generalized societal discrimination—Italians, Poles, Jews, Greeks, Slavs—as a result of which at least some such persons bear the economic and cultural scars of prejudice and thus could be deemed entitled to preference as a form of restitution.[6]

In the crucial field of law, what the people in our urban ghettos need, we suggest, is the very best professional representation obtainable, regardless of the race, religion, sex or national origin of the lawyer. The law, obviously, is an exacting discipline, both intellectually and morally. The minority poor may be just as ill-served, or even cheated, by lawyers from their own communities as by middle class white lawyers. Nor is there any assurance that minority lawyers will return to their own communities to practice, considering other options which may be open to them.

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6. About two years ago, Herbert L. Maise, who is of Italian extraction, brought suit in U.S. District Court in Denver against the University of Colorado, claiming that he was discriminated against in that he was denied admission to the University of Colorado Law School. He demanded that the same special admission standards which were applicable to blacks, Mexican-Americans and American Indians be applied to his minority, which has also suffered discrimination. St. Paul Dispatch, May 10, 1972.

In any event, it is maintained, once admission to law school becomes predicated on any factors other than objectively estimated ability (however imperfect the state of that art may be), the door is open to political favoritism and standards of merit and achievement are bound to be eroded.[7] Moreover, the erosion may well tend to be progressive since, in the interest of demonstrating successful results, there is a strong temptation to grade disadvantaged minority students on a scale less rigorous than that by which others are measured. If this does happen (and some believe it already has), students will quickly perceive that they are beneficiaries of a double standard, which is apt to play havoc with their own self-esteem, not to mention the impact it may have on others who manage to graduate without any favoritism.[8] A significant adverse side effect of preferential treatment is likely to be that those minority students of high ability and accomplishment who excel strictly on merit, nevertheless upon graduation will carry the stigma that they, too, were beneficiaries of a double standard.

Bar examinations have proved to be a cruel impediment to a disproportionately high number of black students who succeeded in obtaining their law degrees. Why this is so is a painfully difficult question. In Michigan, for example,

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7. "It is difficult to accept that 'cultural deprivation' results not in deficiency in essential law school skills but merely in ability to demonstrate them and that they are likely to appear for the first time in law school." Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. of Pa. L.Rev. 351, 358 (1970).

8. "Why does the sense of injustice call actively for equality? One explanation is that equal treatment of all within a recognized class is a necessary attribute of any legal order; the very concept of law requires this minimal regularity." Cahn, THE SENSE OF INJUSTICE, p. 15 (New York University Press, 1949).

in the summer of 1971, the results showed a passing rate of 71 percent for white candidates and 17 percent for blacks. Results in other states, regrettably, have been comparable. Because of the extraordinarily high mortality rate among black applicants throughout the nation, the National Bar Association in 1970 by unanimous vote of its delegates passed a resolution calling for the abolition of state bar examinations. The Association advocates that graduation from an accredited law school within a state should automatically entitle the graduate to practice law within that state. It honestly believes that deliberate racial discrimination on the part of bar examiners continues to play a major role in the disproportionately high rate of failure of black applicants.[9] Since numbers rather than names are customarily used on bar examination papers, this contention is difficult to accept. Although photographs are frequently requested of candidates (to thwart the possibility of "ringers"), there appears to be little evidence, if any, that bar examiners actually match these with examination papers during the grading process. Another hypothesis, which seems more plausible, is that sympathetic consideration in the grading of poorly prepared black students may be prevalent within law schools, but that no such consideration is feasible or, in fact, occurs in the grading of bar examination papers.[10]

9. For an exposition in support of this viewpoint, including black pass-fail ratios, see *Do Bar Examinations Serve a Useful Purpose?* American Bar Association Journal, December, 1971, p. 1215, by Edward F. Bell, judge of the Circuit Court of Wayne County, Michigan, and former president of the National Bar Association.

10. "One conservative professor at Cornell, who fought bitterly against double standards, confessed privately to me that he could not find it in his heart to give a failing grade to a hard-working

(*footnote continued on next page*)

In a feature column, "From Under My Afro," in the Cleveland Sun-Press, headlined "Preferential policy could backfire," James Nelson Coleman wrote on November 15, 1973, in part, as follows:

> There are black educators who ask not to be quoted but say that black students are failing to come up to standard in the nation's colleges where they have been accepted in significant numbers over more qualified white students.
>
> They say that the trouble is that the majority of good white colleges, under the tremendous social pressure created by the black nationalist movement, have substantially changed their admission policies to accommodate black students on a social and humanitarian basis, rather than a strictly academic one. And, in plain language, this has let in a high percentage of black students who are not qualified to do college level work beyond their Black Studies programs.
>
> • • • My own research also makes me aware that a significant percentage of black students admitted to white colleges under preferential enrollment systems (which most white colleges deny they have) are failing to make the grade—especially in the medical schools.

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black girl in his class who clearly had not had the educational background to handle the material in his course • • • he was not prepared to hand out an F as readily to her as he did with white students. This is not an uncommon position." Sowell, BLACK EDUCATION—MYTH AND TRAGEDY, p. 132 (David McKay, 1972).

"A group of black students chained themselves to posts in the Wayne State University Law School this fall demanding the readmittance of fourteen blacks who had flunked out after their first year of law studies. Their demands were met; all fourteen were readmitted. Most of the blacks in question had been taken in under special standards." Salsinger, *A Change of Heart*, Change, November-December, 1970, p. 23.

The problem deserves some thought.[11]

Also germane to the issue of racially preferential admission to professional schools, and of artificially imposed proportional representation therein on the basis of race, are the following excerpts from the widely syndicated column by Roy Wilkins, the distinguished Executive Director of the National Association for the Advancement of Colored People, in the New York Post of March 3, 1973:

> • • • It is ridiculous for Negroes to claim that because they are 40 percent of the population, they should have 40 per cent of the jobs, 40 per cent of the elected offices, etc.
>
> This is self-defeating nonsense, for no person of ability wants to be limited in his horizons by an arbitrary quota or wants to endure unqualified people in positions that they fill only because of a numerical racial quota.

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11. See, e.g., "The American Foundation for Negro Affairs has launched a program to prepare more Negroes to pass the highly competitive tests for admission to schools of medicine, dentistry and other health sciences. Previous attempts by some black groups, which simply demanded that medical schools admit more black students, foundered when many of those admitted flunked out." Fleischman, Let's Be Human (National Labor Service, American Jewish Committee) August-September, 1971.

In a news release from the A. Philip Randolph Institute on November 29, 1973, "In Memory of Arthur Logan," the Institute's Executive Director, Bayard Rustin, observed:

> "He (Dr. Logan) worked tirelessly to root out discrimination from the medical profession. And he was forever encouraging young blacks to take up medicine as a profession, because he believed firmly in its worth. But he believed that black doctors should undergo the same discipline and meet the same standards as others. He was adamantly opposed to the lowering of standards; he understood too well that this would irreparably damage not only the medical profession but also the black community itself."

> • • • Ignoring the decades in which black college students were on a 'zero quota' basis, they went into college admissions policies which on some campuses set aside a percentage of places for black applicants. In some places white applicants with excellent records have been made to stand aside for blacks with inferior records.
>
> • • • Such practices and, in fact, the whole black-tilted system are doing no favors to Negro applicants. God knows it is true that the cards have been deliberately stacked against blacks. Every feasible step, even those costing extra money, should be taken to correct this racialism.
>
> But there must not be a lowering of standards. Negroes need to insist on being among the best, not on being the best of the second-or third-raters • • •.

In his book BLACK EDUCATION, MYTHS AND TRAGEDIES, *supra*, Thomas Sowell, who attended public school in Harlem and is now Associate Professor of Economics at the University of California at Los Angeles, forcefully articulated his own aversion to quotas as a remedy for past deprivation:

> • • • the actual harm done by quotas is far greater than having a few incompetent people here and there —and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people —will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing

> more competence among the rising generation, will be completely undermined, as black becomes synonymous —in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs. (at 292)

In sum, while historically it is understandable, what is wrong with racially based preferential admission to professional schools in social policy terms is that, in the long run, it is counterproductive and doomed to fail. By impairing the principles of individual merit and achievement, it is likely to be more damaging than helpful to the very people it is intended to benefit, not to mention its effect on the society at large.

III

To rectify the consequences of past discrimination, sound social policy mandates affirmative action programs for professional school admission which can pass constitutional muster and which do not discriminate in reverse.

Experience has demonstrated beyond cavil that the legal requirements of non-discrimination and of equal educational opportunity for all, which in historical terms are of comparatively recent vintage, are by themselves inadequate to erase the cumulative effects of the pervasive and deeply rooted discriminatory practices which heretofore have burdened people of color in America. Those of our citizens who have suffered special educational hindrance on the basis of race clearly are entitled to special educational help on the same basis to enable them to compete successfully. The key problem for our society, of course,

is to accomplish this result equitably, i.e. without undercutting the principle of equal educational opportunity for others. All of our young people, in particular, must be encouraged to actualize their educational potentialities to the maximum extent possible, irrespective of race, religion, sex or national origin. In historical terms, it may be said that the burgeoning of our public education system, from the elementary grades through professional school, in a sense has been a vast affirmative action program to provide opportunities for all. It has not been enough, however.

Programs designed to augment the numbers of disadvantaged minority individuals attending professional schools should not await the professional school threshold. The initiatives must begin much earlier. Specifically, we believe that vigorous efforts should be made even at the junior high school level to identify promising disadvantaged students, especially in poor neighborhoods and in schools with large minority group enrollments, so as to provide at this early stage the necessary guidance for them to plan for professional careers.[12] On the senior high school level there is need for additional federally funded remedial programs, such as Upward Bound and College Discovery, to stimulate and to assist students who appear to have the capabilities for professional careers but who, because of

12. "The predominantly Black National Medical Association has started a nationwide recruitment campaign for more Black medical students. 'We're not only trying to define and seek out the bright, young medical student,' explained NMA board member Dr. Ross Miller, 'but we also want to do whatever is necessary to see that that student is successful in *finishing* his medical courses and becoming a good physician.' NMA members will help young Black students as early as the ninth grade plan the curricula that offers them a solid background in the sciences." Fleischman, Let's Be Human, *supra*, December 1973-January 1974.

limiting economic and cultural circumstances, may have no such aspirations or prospects.

No promising student should be excluded from college because of lack of funds. Hence there is need also to expand public college open enrollment programs for high school graduates, such as presently are in operation in the City University of New York, coupled with financial aid and part-time job opportunities, to facilitate attendance by disadvantaged students. While we strongly favor special remedial education programs to enable those who need such assistance to meet the existing requirements for graduation from college, we believe that graduation requirements ultimately must be the same for all students.

The problem of standards inevitably is a difficult and complex one. Every effort should be made to achieve performance validation of all examinations and criteria for admission to institutions of higher learning. Genuinely objective and bias-free selection standards urgently need to be implemented wherever they may be absent. But separate standards exclusively for certain minority group applicants, of course, should be rejected. However, once students are admitted to professional school, all those who encounter difficulty (as many do) should receive as much help as they may require to enable them to qualify for graduation.

What can be done to produce results in expanding minority professional school enrollment through legitimate affirmative action programs has been graphically demonstrated by the success of the Council on Legal Education Opportunity (CLEO) summer institutes. Established in

1968 jointly by the American Bar Association, National Bar Association, American Association of Law Schools and Law School Admission Council, and funded by both public sources and private foundations, CLEO has surpassed by more than a hundred its initial goal of bringing 300 minority group lawyers into the profession by 1973.[13] Were it not for CLEO, many if not most of these lawyers probably would not be in practice today.

To the extent that this pre-admission remediation and orientation program serves to reinforce the capabilities of disadvantaged minority law school candidates so as to enable them to compete successfully with other candidates for admission and during their course of study, on its face it would appear to be free of either constitutional or social policy infirmities. The *caveat,* of course, must be that law schools evaluate CLEO graduates no differently from other applicants, namely, on the basis of their estimated total qualifications and without regard to race.

The central purpose of CLEO, as stated in its by-laws is "to expand and enhance the opportunities to study and practice law for members of minority and disadvantaged groups—chiefly Negroes, American Indians and Spanish-speaking Americans, and thus to help to remedy the present imbalance of [these] and other disadvantaged groups in the legal profession in the United States." CLEO also provides financial stipends to needy students. Although most CLEO students assuredly derive from the groups named therein, not all do, and persons from other disadvantaged backgrounds are not excluded. As was noted recently by CLEO's Executive Director, Prof. Michael J. Moorhead, a number of Appalachian whites have participated in the program.[14]

13. 18 American Bar News, No. 10, October 1973.

14. *Ibid.*

In view of the fact that last year nearly ten applicants competed for each opening in the seven CLEO institutes conducted during the summer of 1973, it seems evident that there is an unmet need for additional programs. Moreover, the attrition rate among CLEO students, once they enter law school, has been reported to be very little worse than that of other law students.[15] In sum, it is this type of affirmative action program for professional school admission which appears to have been successful and thus deserves to be replicated extensively.

Further, law schools themselves, including the University of Washington Law School, should establish special one-semester remedial programs for disadvantaged applicants of all races. Programs of this nature could accommodate a good many of the unaccepted CLEO applicants who are now being turned down for lack of space. Upon successful completion of such a program, students would be enrolled in the law school.

To complement the increasing numbers of minority students who are enrolling in professional schools, it is vital to augment the ranks of minority professors in such schools. Special recruitment efforts are needed to bring into the teaching cadres qualified minority doctors, dentists, lawyers and other practicing professionals, as role models of success for minority students.

Having said all this, it must be acknowledged with sadness that these recommended legitimate affirmative action approaches, while assuredly they can improve matters considerably, provide no magical, instant solution to the problem of insufficient qualified minority group profes-

15. *Ibid.*

sionals. However, neither do any other approaches provide such a solution. With all of the good will in the world, it is simply not possible to bestow instant capabilities on anybody. In the final analysis, individual merit, measured as accurately and objectively as humanly possible, must be the crucial determinant in educational as well as in employment opportunity, rather than artificially imposed proportional representation based on racial or ethnic extraction. As we have already learned through painful experience, a double-standard society will not work for very long.

Conclusion

For the reasons set forth herein, the decision of the court below should be reversed.

Respectfully submitted,

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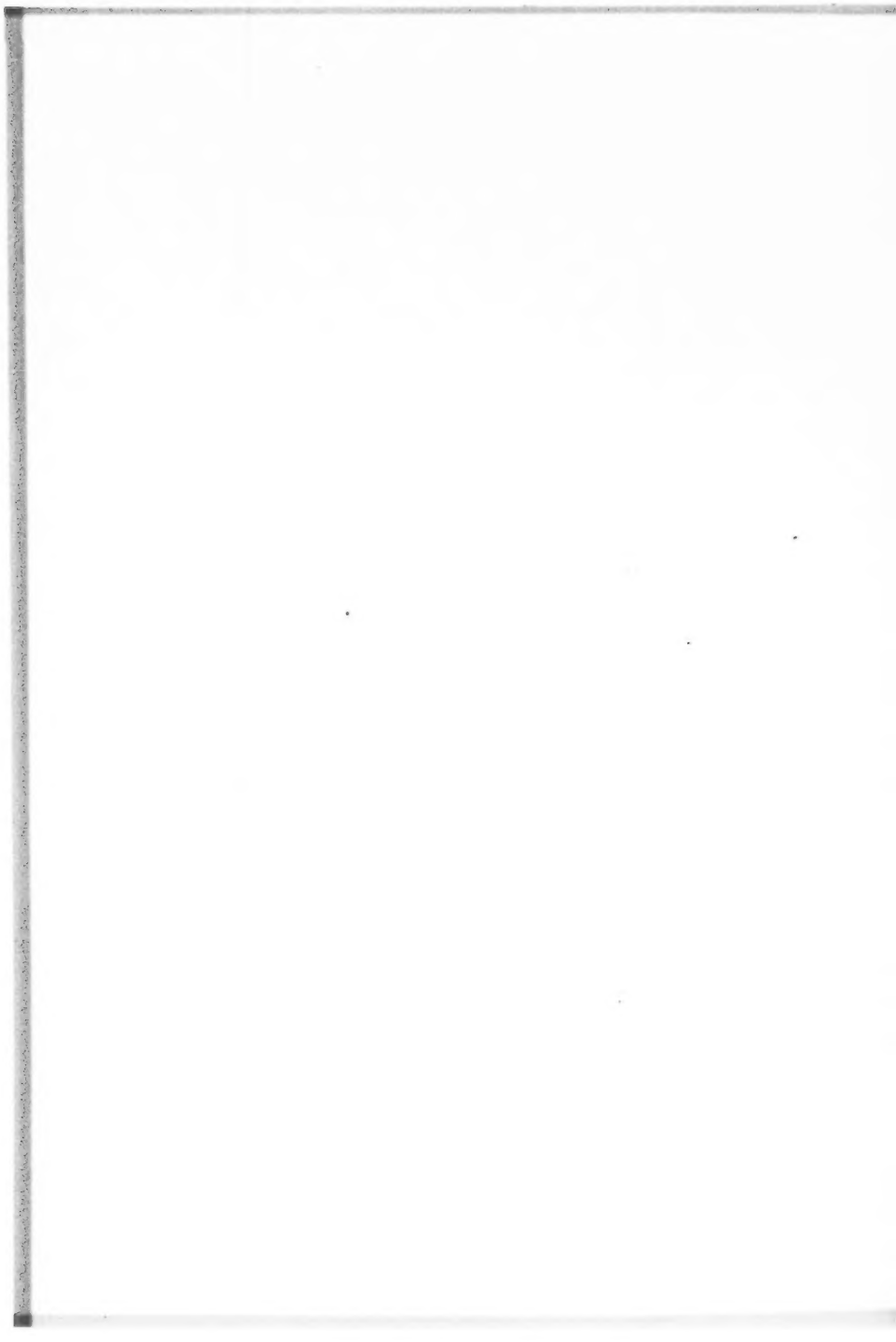

SUPREME COURT, U. S.

FILED

JAN 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Petitioners,

vs.

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

This brief is submitted with the consent of the parties.

Statement of the Case

This suit was initiated in 1971 by petitioner Marco De Funis and members of his family after his application for admission to the law school of the University of Washington was rejected. He asserted that the rejection was on the basis of race and that it therefore violated the Equal Protection Clause of the Fourteenth Amendment. His complaint was sustained, following trial, in the Superior

Court of the State of Washington. The Supreme Court of the state reversed, voting 5 to 2. This Court granted certiorari to review that decision.

The facts are stated in the brief of petitioners and in the extensive opinions of the Supreme Court of the State of Washington. The critical facts, in our view, are these:

1. Applicants to the limited places available in the entering class of the Washington University Law School are placed in two separate pools on the sole basis of race. Minority applicants are compared only with other minority applicants, not with nonminority applicants. The Law School defines minority applicants as including only Black Americans, Chicano Americans, American Indians and Philippine Americans.

2. Selections for admission are in effect made separately from the two pools. Although the Law School denied the existence of a fixed numerical quota, admittedly a sufficient number of applicants are selected out of the minority pool—without regard to overall comparisons with the entire pool of applicants—to yield a "reasonable representation" of minority students.

3. As a result of this process, some minority students are selected for admission who would be summarily rejected were they outside the defined minority group.

4. No effort is made to ascertain the cultural and economic handicaps or advantages of individual applicants and they are not compared on that basis. The minority applicant from a middle-class environment and a superior school system remains a part of the minority pool. The white applicant from an impoverished, deprived environment is compared only with other whites.

5. Nor is any effort made to determine the future goals of prospective applicants of any race and more particularly the extent of their commitment to the effective representation of all groups in the community, especially the underprivileged. The difference in standards applied to the two groups is based on race alone.

Interest of the *Amicus* and Question to Which This Brief Is Addressed

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in employment, education, housing and public accommodations and has supported programs which would increase opportunities for disadvantaged minorities and speed the day when all Americans may enjoy full equality without regard to race.

We submit this brief because we believe that our system of constitutional liberties would be gravely undermined if the law were to give sanction to the use of race in the decison-making processes of governmental agencies and because we believe that disadvantaged students can be aided by other procedures that are both constitutional and practical.

The American Jewish Congress believes that, in order to achieve equal educational opportunities for disadvantaged applicants, a university

> —should not make admissions decisions on the basis of mechanical scores and grade averages alone;

—should consider such factors as poverty, deprived family background, inadequate schooling or the other circumstances which may lead to lower scores in admissions aptitude tests;

—should seek out and admit applicants from all segments of the community nad provide special assistance to students who suffer academic handicaps as a result of cultural and economic deprivation.

Such admissions procedures, which genuinely attempt to seek out the culturally and economically deprived and to weigh previous performance in the light of such deprivations, would raise no question of equal protection of the laws. But that is not this case.

The sole question in this case, in our view, is whether state law school admission procedures may treat applicants differently, subjecting them to different standards and different basis of comparison, solely because of their race. We submit that such a procedure is constitutionally prohibited.

ARGUMENT

The racial classification adopted by Washington State Law School in its admissions procedure violates the Equal Protection Clause of the United States Constitution.

"[R]acial classifications are 'obviously irrelevant and invidious'." *Goss* v. *Board of Education,* 373 U.S. 683, 687 (1963); *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, 203 (1944). For this reason, the adoption of such classifications by a state agency is "suspect" and justifiable only by "pressing public necessity," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), bears a "very

heavy burden of justification," *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967), and must be subjected to the "most rigid scrutiny." *Korematsu, supra;* see also *McLaughlin* v. *Florida*, 379 U.S. 184, 191-2, 196 (1964).

The weight of the burden laid upon the states under this principle is illuminated by the fact that, except in the Japanese Exclusion cases, handed down in the crisis conditions of a wartime emergency, this Court has never upheld governmental action which deprived persons of an opportunity or a benefit on grounds of race or ancestry.[1]

The racial classifications struck down by this Court have not been limited to those aimed at any one particular racial or ethnic group. Nor have they been restricted to those deemed "invidious" because they stigmatize and denote the inferiority of a minority group. Racial classifications which fall on members of the minority and majority racial groups with equal force have been found constitutionally defective without reference to the issue of "stigma."[2] *McLaughlin* v. *Florida*, 379 U.S. 184 (1964);

1. *Korematsu, supra* and *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), upholding the exclusion of Japanese Americans from large sections of the West Coast, involved a temporary deprivation in time of war and threatened invasion which the Court deemed justified as necessary to meet the danger of sabotage and espionage. Even so, they have been severely criticized on both legal and factual grounds. Ten Broek, Barnhart and Matson, Prejudice, War and the Constitution, pp. 308-9, 325-334 (1954); Grodinz, Americans Betrayed: Politics and the Japanese Evacuation (1949); Rostow, The Japanese American Cases—A Disaster, 54 Yale L.J. 489 (1945).

2. Realistically speaking, the racial classification herein is doubly "invidious." Since its underlying rationale must be that minority groups, *qua* minorities, cannot compete for limited admission places on the same terms as nonminority applicants, it "stigmatizes" the minorities. And since its effect is to deny highly desired places to nonminority applicants because they are of one race rather than another, it is "invidious" as to them.

Loving v. *Virginia*, 388 U.S. 1, 10 (1967); see also *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); *Buchanan* v. *Warley*, 245 U.S. 60 (1917).

To survive legal challenge, then, it is immaterial whether a racial classification is thought to be "benign" or "invidious." Rather, the test is whether the classification can be "shown to be necessary" (*McLaughlin, supra*) to "the accomplishment of some legitimate overriding statutory purpose." *Loving, supra*, at 11.

A. The racial classifications inhering in the Law School's admissions procedure are not necessary for the accomplishment of any legitimate purpose.

To the extent that the state has a legitimate public interest in overcoming cultural and educational disadvantages of persons applying for admission to its Law School, it can and should do so without consideration of race. Thus, prohibiting the University of Washington from using admission procedures which treat applicants differently solely because of race would not bar the Law School from considering the problems of disadvantaged students and assisting them in overcoming cultural or economic handicaps, thereby expanding the educational opportunities of our nation's historically deprived minorities, among others. A law school could not only encourage applications from all groups in the community, it could engage in particularly vigorous recruiting in areas and institutions where there are likely to be large numbers of disadvantaged students. It could also provide compensatory educational preparation, both prior to admission and during school attendance

for those whose backgrounds have handicapped them scholastically.

Nor would a prohibition of racial classification require educational institutions to admit students solely on the basis of numerical ranking on standardized tests or prior academic performance as evidenced by mathematically computed grades.[3] Schools may and, we think, should evaluate these scores in the light of a candidate's family background; whether he came from a culturally impoverished home; the nature and quality of the schools he attended; whether family circumstances required him to work while attending school; whether he chose to participate in athletics, the orchestra, school newspaper, literary magazine, campus government; whether he had demonstrated a concern and interest in the broader community by political activity or volunteer work among the sick or underprivileged; and whether he had manifested leadership, industry, perseverance, self-discipline and intense motivation. All of these factors may constitutionally and legitimately be considered by the school. They not only provide a method of interpreting the numerical scores but also reveal the presence of additional qualities which are predictive of potential for success in school, in the professions and as a contributor to society at large.

Moreover, if a school were to conclude that the legal profession as presently composed fails to serve the dis-

3. It has been argued that many standardized tests are culturally biased in favor of white middle class culture and do not reveal the innate ability of the culturally disadvantaged student. However, the court below specifically declined to hold that the examinations in this case were less reliable indicators of law school performance for minority students than for others. 507 P. 2d at 1186. Hence, the issue of whether the use of such tests is constitutional is not raised in this case.

advantaged elements in society—although the demonstrated professional aspirations of recent classes of law school graduates makes such a judgment questionable—then it could also consider whether applicants for admission, black or white, express a commitment to serve those groups currently lacking adequate legal service.[4]

All of these procedures would result in greater educational opportunities for members of our society's historically deprived minorities, as well as other applicants who are economically and culturally deprived; none of these procedures would offend the Constitution. But what the school may not do, we submit, is to classify applicants for admission on the basis of race, assume that all of one race are culturally deprived or economically handicapped and all of another race are not, and so structure its selection process as to admit an essentially predetermined proportion from each racial group.

It is this kind of arbitrary and factually unsound assumption that the Equal Protection Clause condemns. The fact is that many whites suffer economic and cultural deprivation; many are psychologically blighted by poverty; many have attended inadequate schools; and many must work while in school to support themselves and their families. Many are deeply committed to serving the disadvantaged of all races, and that is their principal motivation to become lawyers. Conversely, many applicants from

4. It has been pointed out that there is no reason to assume that minority group graduates will necessarily choose to serve in the minority group community. Indeed, it is arguable that that should not be demanded of them. They should have both the right and the opportunity to choose instead to seek entrance into the general economy, via the "Wall Street" firm or otherwise.

minority races come from middle-class homes and good schools. All this is ignored by an admission procedure which, in the words of the court below, "does not include personal interviews and does not reveal whether applicants are poor or affluent" (507 P. 2d at 1173), which casts all minority applicants regardless of background into one pool and all nonminority applicants regardless of background into another, and compares members of each racial group only with those of the same grouping. Through this procedure, racial assumptions are arbitrarily and unconstitutionally applied so as to defeat the personal rights of individuals to be free from discrimination on grounds of race. This Court has held that such action is prohibited by the Equal Protection Clause. See, e.g., *Henderson* v. *United States*, 399 U.S. 816, 824, 825 (1950); *Mitchell* v. *United States*, 313 U.S. 80, 97 (1941); *McCabe* v. *Atchison T. & S. F. Ry.*, 235 U.S. 151 (1914).

If the command of equal protection is to be obeyed, the law school must compare all applicants with each other on the basis of all pertinent factors—of which race is not one—giving each factor its due weight. Only in this way can the constitutional demands of justice and equality be met.

B. The racial classification herein is not justified by any valid compelling state interest. The reasons advanced below are neither legitimate nor sufficient.

None of the interests which the court below advanced as justification for the Law School's action have that element of legitimacy, urgency and awesome need which this Court has held essential to overcome our traditional ab-

horrence of racial classification. Indeed, not only do the considerations cited by the state court fail to satisfy the burden of urgent necessity but they are themselves antithetical to the basic principles on which our society and its institutions are founded. See *Mulkey* v. *Reitman*, 64 Cal. 2d 529, 544, 413 P. 2d 825, 835 (1966), aff'd 387 U.S. 369 (1967); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

In essence, the Washington court's holding that a racial double standard is a valid means for eliminating "racial imbalance" in law schools and in the legal profession rests on the rationale that race is a job-related factor for lawyers, at least for a certain percentage of them, and hence a legitimate qualification for law students. Thus, the opinion below argues that, because lawyers should be "cognizant of the views, needs and demands of all segments of society," the production of a racially balanced student body through dual racial standards is justified. Furthermore, contends the Washington court, the "legal professional plays a critical role in the policy-making sector of our society," there is a "shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—" and, therefore, "If minorities are to live within the rule of law, they must enjoy equal representation within our legal system." 507 P.2d 1169, 1183-4.

The "compelling state interest" thus postulated by the Washington court assumes that only members of a particular ethnic group can understand, respond to and represent members of that group or communicate their needs and aspirations, both in the classroom and in the courtroom. This assumption embodies a conception of "group think" in which all members of a particular minority group have

an identical and distinct set of views and values arising out of an identical life experience. It assumes that race and ethnicity transcend all other factors which tend to result in common values, views and needs, on the one hand, or diverse ones, on the other. It represents the ultimate denial of a trained professional's ability to transcend his own life, style, experience and group identity in the effective discharge of his professional responsibilities.

If this ethno-centric view were correct, then, conversely, from the standpoint of the minority constituency, there would be a right, entitled to recognition as a "compelling state interest," to have available a substantially proportionate number of attorneys, prosecutors and judges of their own race. Under this premise, an indigent defendant would be entitled not only to court-appointed counsel, but to an attorney who is a member of his particular racial or ethnic group. Law firms with predominantly minority practice could, with constitutional propriety, refuse to hire nonminority employees on the ground that they could not properly serve their clients.[5]

By the same token, if the view expressed below were valid, then minority group members need not abide by statutes and decisions made by a judiciary or legislature

5. Conversely, acceptance of this view would endanger progress toward integration of minority practitioners in firms with predominantly nonminority clients. Over the years, we have consistently supported the now well-established principle, that discrimination in employment cannot be justified on the ground that minority employees are unable effectively to understand or deal with those of another race or that customers or clients of a particular firm feel more "comfortable" with those of their own racial, religious or ethnic background. Is that discredited notion now to be reintroduced in reverse garb?

that lacked a substantially proportionate representation of their own racial or ethnic group. Indeed, the court below virtually says this in so many words. 507 P.2d at 1184.

The entire concept which underlies the decision below is factually and psychologically unsound, legally and constitutionally erroneous, and profoundly damaging to the fabric of American society.[6] It should be squarely rejected.[7]

The concept that race is a job-related qualification for lawyers or any other profession or occupation has been explicitly repudiated by the Congress of the United States. In formulating Federal antidiscrimination policy, Congress

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6. Many public officials, white and black, transcend their group consciousness to represent the concerns and interests of all their constituents and, in fact, of all Americans. But this case involves law schools and lawyers, and we need look no further than the reported decisions of this Court in the last fifteen years, briefed and argued by attorneys such as Jack Greenberg, Anthony Amsterdam and Michael Meltsner. Can it be seriously urged that these white attorneys are unable to understand, empathize with, articulate and represent the views, needs and interests of minority groups to which they do not belong but whose cause they frequently plead? How ironic it would have been if practitioners such as these had been denied admission to law school because of a racial classification system grounded in the supposition that they could not be expected to supply adequate legal representation to members of minority groups.

7. The court below also sought to justify the Law School's minority preference policy on the ground that minority groups were seriously underrepresented in the Law School even though such groups participated on an equal basis in the tax support of the School. 507 P.2d at 1182. This contention is factually incorrect, legally unsound and unworthy of serious consideration. All persons are entitled to equality of opportunity to be admitted to a state-supported school without regard to race or to taxes paid by members of their race. That is a far cry from justifying state-imposed racial proportional representation. Clearly, if public benefits and opportunities are to be distributed to members of racial and ethnic groups in proportion to the taxes each group pays, the present disadvantages which afflict many members of racial and ethnic minorities would be sharply increased rather than reduced.

provided that race or color could never be a qualification for any position. It made no exemption for law schools or law firms. Thus, although Title VII of the Civil Rights Act of 1964 permits employers to utilize such suspect classifications as national origin, sex or religion, if they can establish this to be a "bona fide occupational qualification," the Act provides no such exemption for alleged qualifications based on race or color, 78 Stat. 255 (1964), 42 U.S.C. §2000e 2(e).[8]

Similarly, state regulatory agencies administering state fair employment practices statutes containing exceptions for "bona fide occupational qualifications" early held that race and color were not job-related qualifications.[9]

The legitimization of racial quotas[10] or balancing on the theory that this is a necessary means to achieve adequate understanding of the needs, views and values of minority groups cannot be confined to law schools and the legal profession. The same theory, if valid, would apply to physicians, psychologists, social workers, bankers, businessmen, political officeholders and a broad spectrum of economic, professional and governmental occupations, with equally

8. Indeed, in Title VII Congress squarely prohibited employers from voluntarily granting preferential treatment to members of racial, ethnic, religious or sexual groups in order to correct "imbalance" in their work forces. 42 U.S.C. §2000e-2(j) (1964).

9. See e.g. *Survey Associates, Inc.* discussed in Report of Progress of New York State Commission Against Discrimination (1948, p. 73) (color held not to be a "bona fide occupational qualification" for a social worker working with Negro clients).

10. The court below indicated that the Law School did not have a racial quota, in the sense of a precisely fixed number of places allotted by race. Instead, the court used the term "proportionate representation." 507 P.2d at 1184. Factually and constitutionally this is a distinction without a difference.

profound and divisive implications. The result would be a race-conscious society in which a proportionate number of places in colleges, professional schools and occupational categories would be set aside for members of particular racial groups.

This is neither a whimsical nor a farfetched view. Proposals for racial proportional representation in schools of medicine, dentistry, education, architecture and other service professions are regularly advanced and in many cases instituted, each resting on the same premise as that underlying the decision below: that doctors of a particular race can better serve members of that race, social workers of a particular race can more compassionately understand clients of that race, and professors of a particular race can more effectively teach students of that race.

But the consequences of the theory adopted below extend even further. The argument that only persons of a particular group can understand and respond to the needs and demands of that group cannot be limited to minority racial groups. If valid, it would be equally applicable to ethnic, religious and sexual groups. The same demands for proportionality in schools, professions and occupations could justifiably be made by representatives of these groups, and, where proportionality is lacking, the application of racial, ethnic, religious or sexual classifications to eliminate the imbalance would be constitutionally valid. This, too, is neither a speculative nor a hypothetical possibility; it is a developing trend based on the example of racial quotas.

A society permeated by racial, ethnic, religious and sexual proportional representation would be something

quite different from the America we have known. Far from being abhorrent, invidious and irrelevant, racial and ethnic classifications would be officially sanctioned and recognized in all walks of life; each professional or office holder would be regarded, and would regard himself, as a representative of the group from whose quota he comes; and individual aspiration would be limited by the proportionate size of the group to which the individual belongs.

This Court has already struck down state-imposed employment quotas based on alienage, holding that state action which has the effect of denying certain inhabitants the right to work for a living on grounds of race or nationality is violative of the Equal Protection Clause because destructive of the "very essence of the personal freedom and opportunity * * * it was the purpose of the Amendment to secure." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915). The Court has also recognized the tension and discord created by efforts to achieve racial proportional hiring when it upheld the right of a state to prohibit such efforts. *Hughes* v. *Superior Court*, 339 U.S. 460 (1950).

The racial classifications imposed by the Unversity of Washington and the theory under which they have been rationalized partake of the same evils which this Court correctly perceived in *Truax* and *Hughes*. The racial admission practices of the Washington State Law School should be similarly invalidated.

C. The racial preferential treatment policy of the law school is not sanctioned by past decisions dealing with correction of illegal discrimination.

The cases relied upon by respondents and the court below to justify use of racial criteria in law school admission procedures fall into two basic classes: those involving the desegregation of racially separate public elementary and secondary school systems and those seeking to remedy specific acts of employment discrimination in a particular industrial establishment. Both groups of cases are fundamentally distinguishable; neither upholds the use of racial classification or preference in the admission of applicants to a limited number of places in a particular educational institution.

The School Cases

The school desegregation cases differ from the case at bar in that they involve a pool of white and black students all of whom, regardless of their background or educational potential, must be admitted and educated by the particular system. Race is used only to determine placement in a particular unit of the school system. No student has a constitutional right superior to any other student to attend a particular school in the system. Therefore, when race is used in that placement procedure in order to achieve a valid and constitutionally mandated public educational objective, i.e., integrated public schools, no one has been "preferred" and no one has been deprived of equal protection of the laws. All students have obtained what state and Federal Constitutions guarantee: a public education in an integrated school. That is far different from the situation at bar. Here, racial classifications have been instituted to determine *who* will fill the limited number of seats avail-

able and, as a result of the operation of this admissions procedure, some applicants, because of their race, have been denied a law school education entirely.

Furthermore, in the school cases, the courts have approved consideration of the racial composition of student bodies solely as a remedy to desegregate schools previously subject to illegal segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968).

As this Court noted in *North Carolina State Board of Education* v. *Swann, supra*, the adoption of apparently neutral "color blind" school assignment plans by a previously segregated system would render illusory the promise of *Brown* for it would deprive school authorities of the one "tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems" (402 U.S. at 46). To assure the effective disestablishment of an officially maintained segregated school district and the creation of a "unitary system," this Court has upheld desegregation plans which take race into account in the allocation of the student body among the various schools in the system. However, as the court below candidly admits, there is no showing of discrimination by Washington State University or its law school. Thus, this case lacks the element which conspicuously distinguishes the school cases; that racial classifications are used solely and only to the extent necessary to remedy illegal discrimination practiced by the particular school system.[11]

11. There is a vital distinction, we submit, between remedial action to correct specific illegal acts of discrimination and a general rule allowing preferential treatment to undo the effects of past dis-

(footnote continued on next page)

The Employment Cases

The employment cases cited by the court below[12]—like the school cases—are characterized by judicial findings of specific prior discriminatory acts by the particular institution or employer involved. The problem in formulating a remedial order is to overcome the residual effects of past discrimination by that employer. Because of discrimina-

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crimination by society at large. Correction of conduct committed by an individual defaulter can be and has been limited to situations in which the default is precisely delimited and clearly established. Furthermore, the relief given is tailored to correct the particular situation and is usually imposed under the authority of a court or other tribunal.

It is quite different to give every state university, and all other official bodies as well, a license to ignore the constitutional prohibition of racial discrimination whenever they allege it is necessary to do so to correct the effects of past societal discrimination. There is no reliable procedure for determining the existence or scope of such past discrimination or its impact, if any, on the operations of the institution in question; nor are there standards for determining how recent, pervasive or gross societal discrimination must have been to warrant preferential treatment, what correlation there must be between past discrimination and present handicaps or at what point a period of nondiscriminatory treatment will terminate the right to a racial preference.

Finally, there are no agreed-upon ways to determine what measures are necessary to effect a remedy or even what groups shall be the beneficiaries of such preference. For example, the appellees herein chose to exclude Asiatic Americans from the operation of their preferential system. In light of the severe discrimination against these groups in the Western United States, many would disagree.

Relaxation of the constitutional requirement of equal treatment should not be permitted on so vague a basis. The effect, we submit, would be hardly different from outright nullification.

12. *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. den.* 406 U.S. 950 (1972); *Contractors Ass'n. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir. 1971), *cert. den.* 404 U.S. 854 (1971); see also *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), *cert. den.* 404 U.S. 984 (1971); *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972); *United States* v. *International Brotherhood of Electrical Workers Local 212*, 472 F. 2d 634 (6th Cir. 1973); *United States* v. *Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Commission*, 482 F. 2d 1333 (2d Cir. 1973).

tion in hiring and promotion policies, segregated seniority lines, and non-job-related tests, the existing work force is not composed as it should have been had constitutional standards of nondiscrimination been maintained. In a discriminatorily created work force, only a limited number of job openings occur from time to time. Under these circumstances, a racially "neutral" policy superimposed on a racially discriminatory pattern would not effectively remedy and disestablish the discriminatory system. It would instead, perpetuate the effects of discrimination. Accordingly, the courts have reluctantly found it necessary to employ racial classifications in fashioning remedies.[13]

But admission to a law school class is fundamentally different. Each year all the positions are open for selection. There is no question of filling a few vacancies in an existing discriminatorily created work force. Rather, to use the employment analogy, it is as though the whole work force were hired anew each year. Thus, there is no issue of perpetuating discrimination (which here did not exist in any event) and no need or justification for imposing racial classifications or preferences in the annual admission of an entire new law school class.

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13. See e.g., *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1277-78, 5 FEP Cases 1225, 1239-40 (remedies based on racial classifications called "counterproductive," tending to "generate resentments"), aff'd, —— F. 2d ——, 6 FEP Cases 1045, 1053 (2nd Cir. 1973) (temporary quota system approved "somewhat gingerly" and "only because no other method was available for affording appropriate relief without impairing essential city services"); *Bridgeport Guardians, Inc.* v. *Commission*, 482 F. 2d 1333, 1340 (2d Cir. 1973) (quota relief approved "somewhat gingerly"); *Castro* v. *Beecher, supra*, 459 F. 2d at 736 (effort at compensatory racial relief termed "crude" to "be pursued with sensitivity and restraint"); *Shield Club* v. *City of Cleveland*, —— F. Supp. ——, 5 FEP Cases 566, 567 (N.D. Ohio 1973) (quota ordered, remedy choices found freighted with "weakness and individual and group inequities").

Conclusion

For the foregoing reasons, we respectfully urge that the judgment of the Washington Supreme Court be reversed and the admission procedures of the Washington State Law School declared unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Respectfully submitted,

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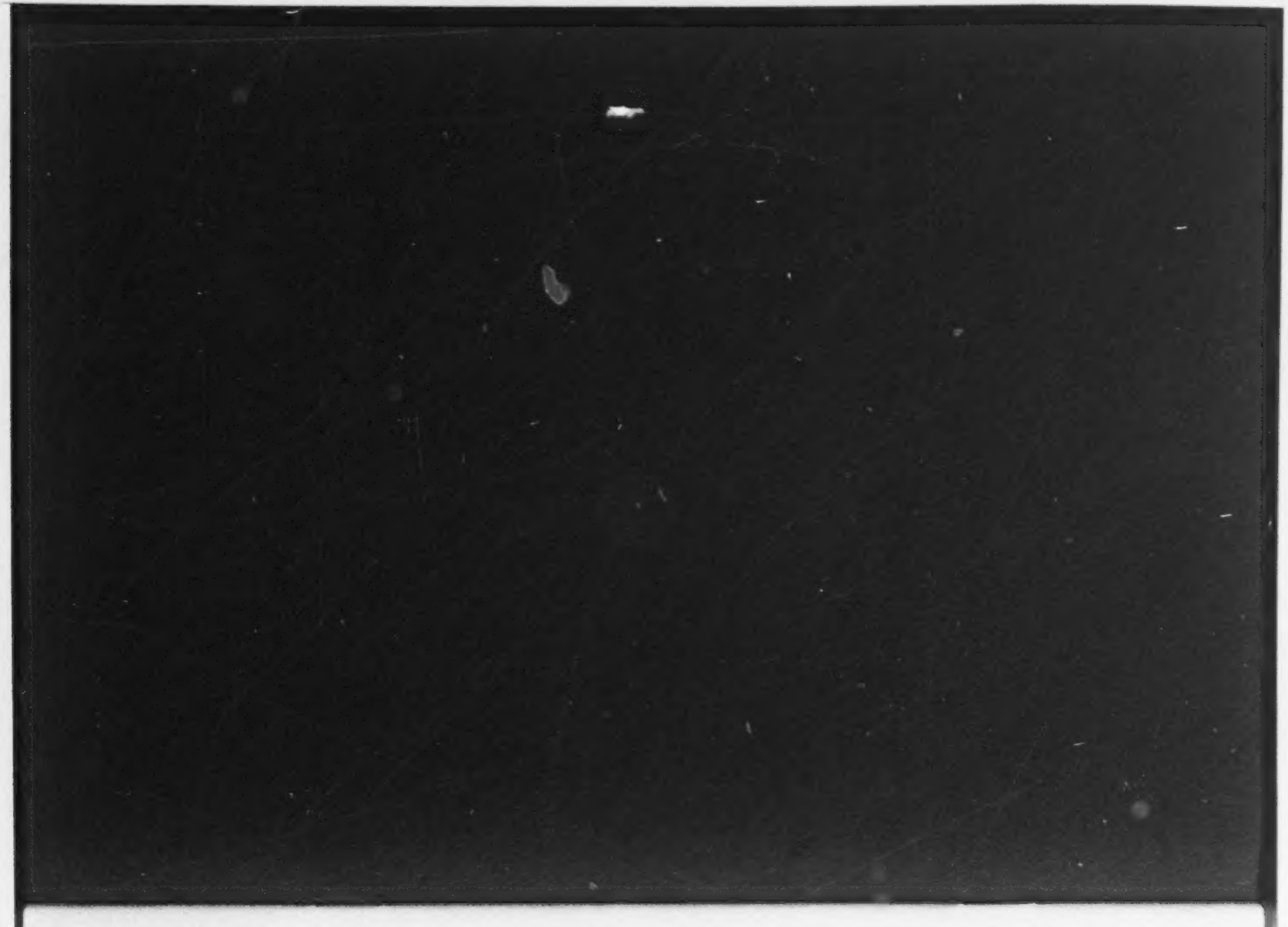

No. 73-235

JAN 18 1974

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OCTOBER TERM, 1973

MARCO DE FUNIS, *et al.*,
Petitioners;

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, *et al.*

On Writ Of Certiorari To The Supreme Court Of The State Of Washington

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the petitioners, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

In the instant case the Supreme Court of the State of Washington held that the University of Washington Law School could prefer for admission to the limited number of places in the Law School's first year class, applicants of certain races (black Americans, Chicano Americans, native

American Indians and Philippine Americans), who were acknowledgely less qualified under the School's admission standards than applicants of other races. That court concluded that this system of racial classification was justified by the elimination of "racial imbalance within public legal education," (507 P.2d at 1182), the production of "a racially balanced student body at the law school," (*id.* at 1184), and the alleviation of a nation-wide "shortage of minority attorneys," (*ibid*).

The position of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is that this holding can not be squared with the Fourteenth Amendment's guarantees of due process and the equal protection of the laws.

The AFL-CIO is a federation of 113 national and international unions having a total membership of approximately 13,500,000 working men and women. The Federation's interest in the question presented here is the product of the following interrelated considerations:

First:

> "[T]he labor movement is the most integrated major institution in American society, certainly more integrated than the corporations, the churches, or the universities. * * * The percentage of blacks in the unions is a good deal higher than the percentage of blacks in the total population. * * * Moreover, blacks are joining unions in increasing numbers. According to a 1968 report by *Business Week*, one out of every three new union members is black." Rustin, *The Blacks And The Unions*, Harper's Magazine, May, 1971, pp. 73, 76.

The major function of the trade union movement is to act

as its members' exclusive bargaining representative in dealing with their employers on matters of "wages, hours, and other terms and conditions of employment." See §§(a)(5), 8(d) & 9(a) of the National Labor Relations Act, as amended, 29 U.S.C. §151 *et seq.* And as this Court has recognized:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make then invalid. The complete satisfaction of all represented is hardly to be expected. * * * Differences in wages, hours and conditions of employment reflect countless variables." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338.

Thus, unions are front-line institutions dealing with and attempting to harmonize, on a day-to-day basis, the inevitable clashes of economic interest between individual employees and between groups of employees (as well as those between employees as a class and their employers).

Organized labor, therefore, well understands that there is no escape from the necessity of rules of selection where there are more applicants than there are openings, whether the places to be filled are jobs, or positions in a professional school (which serves as the method of entry to a particular field of endeavor). And the union movement is fully cognizant that in our society, where employment is a major determinant of economic position, such rules are perhaps the most important of all the norms governing the allocation of scarce resources. Precisely because this is so, organized labor knows that if there is to be domestic tranquility these rules must be fair in fact and must be per-

ceived to be fair by those whose fate they decide.

George Lichtheim has pointed out: "If economic conflict as a source of political antagonism is ruled out * * * the residual tensions * * * need not and doubtless will not fall to zero; but they can be held down to a tolerable level." *What Socialism Is and Is Not,* The New York Review of Books (April 9, 1970) p. 5. Job competition (of which access to professional training is but one form), then, in itself, is perhaps the most volatile of social forces. This force is most potent in a period, such as the present, in which high and rising unemployment, spiraling inflation, a gathering recession, sudden shortages of basic resources requiring a radical restructuring of established life and work patterns, and an overall pace of technological, social, and political change of frightening rapidity, maximize normal anxieties about what the future holds. In this context when job competition is combined with competition on the basis of race the result is a quantum jump in the potential for a violent disequilibrium.

The union movement, both as a matter of principle and on the basis of its practical experience, is, therefore, firmly committed to the proposition that the one best hope for achieving social harmony is to require that these rules of selection must make "job * * * qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant," that they must not constitute "artificial, arbitrary, and unnecessary barriers to employment [that] operate invidiously to discriminate on the basis of racial or other impermissible classification," and that they must not provide a "[d]iscriminatory preference for any group, minority or majority * * *," (cf.,

Griggs v. *Duke Power Co.*, 401 U.S. 424, 431).

This commitment is not based on the fallacy that there are selection criteria the predicative powers of which approach the accuracy of the litmus test. Rather it is predicated on the recognition that once a retreat is beat from "fair and racially neutral employment • • • decisions," (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 801), there is no equitable method of mediating between the competing claims of minority workers, majority workers, employers and the society at large.

Because the decision below rejects the proposition stated in *Griggs* and *McDonnell Douglas*, its effects are pernicious, although its intentions are the best.

Second, the AFL-CIO's commitment to equal opportunity as just defined has been manifested in two major parallel courses of action.

The Federation pressed for enactment of Title VII of the Civil Rights Act of 1964 (and the strengthening 1972 amendments), with the approving understanding that the union movement would be strictly regulated thereby. It has been the only multi-racial organization to thus prefer fidelity to the eradication of racial discrimination ahead of the self-interest in freedom from government dictation in the conduct of its internal affairs. As Bayard Rustin has recalled:

> "The union drive against discrimination was exemplified by the fight made by the AFL-CIO to have a Fair Employment Practices section written into the 1964 Civil Rights Act. Both President Kennedy and Robert Kennedy were opposed to including an FEPC

section because they thought it would kill the bill, but George Meany pressed for it. He did so for a simple reason. The AFL-CIO is a federation of affiliates which retain a relatively high degree of autonomy. The parent body can urge compliance with its policies, but the decision to act is left up to the affiliates. Meany felt that the only way the AFL-CIO could deal effectively with unions practicing discrimination would be to demand compliance with the law of the land. He testified before the House Judiciary Committee that the labor movement was calling "for legislation for the correction of shortcomings in its own ranks." And the passage of the 1964 Civil Rights Act greatly speeded the process of this correction." Rustin, The Blacks And The Unions, *supra* at p. 76.

In a complementary effort, the AFL-CIO has been a major force in a far-ranging affirmative action program, the Apprenticeship Outreach Movement, to assure that minorities have meaningful access to the most highly skilled and well paying technical jobs in industry. William M. Ross, the Deputy Executive Director of the Recruitment and Training Program Inc. of New York, in a speech to the Annual Rocky Mountain Apprenticeship Conference in Salt Lake City, delivered in November 1973, described the essence of the Outreach approach as follows:

"Above all else, the outreach approach is an advocacy strategy which is designed to provide a wide variety of tutorial and supportive services to minority workers who are seeking entry in the apprenticeship training programs and skilled jobs in the construction industry.

"The outreach concept originated in 1964 when The Workers Defense League established a program to recruit black and Spanish speaking youth for placement

in construction apprenticeship training programs in New York City. This program was the outgrowth of a series of violent demonstrations which occured at several construction sites in the city during the summer of 1963. These demonstrations, which were part of an attempt to halt all publicly financed construction in New York until 25 percent of the jobs in this industry were filled by black and Spanish speaking workers, resulted in hundreds of arrests and costly work stoppages. The Harlem hospital project, which was shut down for more than four months, cost the city of New York more than $250,000 for overtime payments to police alone. The total cost of this shut down ran into the millions.

"Together with most of the other civil rights organizations in the city, the W.D.L. became a member of the Joint Committee on Equal Employment Opportunity which was established to coordinate the various demonstrations. Initially, these protest activities were predicated on the belief that it would be relatively easy to find enough qualified black and spanish workers to fill the job slots which were being demanded, if sufficient legal and community pressure could be brought to bear upon the unions and contractors to force them to open their apprenticeship programs to non-whites. However, it soon became increasingly obvious that a special effort was required to seek out qualified applicants who would commit themselves to a career in the building trades.

"With a small grant from the Taconic Foundation, The Workers Defense League rented a storefront in the heart of the Bedford-Stuyvesant ghetto in Brooklyn and established a program to (1) disseminate information on construction employment opportunities; (2) to recruit, counsel, and tutor black and Spanish speaking apprenticeship applicants and (3) to provide follow-up sup-

portive services to the non-white apprentices who were accepted into the unions' training programs.

"Within our first two years, we had placed more than 500 black and Spanish speaking youths in apprenticeship programs.

"Because of our success in New York and the failure of other approaches in various cities around the country, our outreach concept was adopted as a formal program within the Manpower Administration of the U.S. Department of Labor in 1967. Subsequently, our approach became the model for several other local organizations throughout the nation.

"Since 1967, the apprenticeship outreach movement has grown by leaps and bounds. At the present time, there are 120 federally funded outreach programs in 227 different cities. Of this total

. . . 37 are operated by the Urban League's Leap Program

. . . 26 are operated by R-T-P

. . . 17 are operated by local building and construction trade councils

. . . 15 are operated by the AFL-CIO Human Resources Development Institute

. . . 24 are operated by other miscellaneous local organizations such as the Trade Union Leadership Council in Detroit and Philadelphia; The New Jersey Department of Labor and Industry; The Mexican-American Opportunities Foundation in Los Angeles; The Opportunities Industrialization Center in Pittsburgh, etc.

"Because of the apprenticeship outreach movement, there has been a dramatic and significant increase in

the number and percentage of minority youth in construction apprenticeship programs. For example:

> . . . In 1960, there were less than 2,000 non-white apprentices in the *entire United States*, and as late as 1966 non-white apprentices represented only two percent of all registered construction apprentices.
>
> "But between the time the outreach program was first funded in 1967 and July of this year more than 26,000 non-white youths have been indentured in registered apprenticeship programs in construction.
>
> | | |
> |---|---|
> | 274 | Asbestos Workers |
> | 1223 | Bricklayers |
> | 5372 | Carpenters |
> | 1126 | Cement Masons |
> | 2896 | Electricians |
> | 466 | Elevator Constructors |
> | 251 | Glaziers |
> | 1411 | Iron Workers |
> | 287 | Lathers |
> | 1603 | Operating Engineers |
> | 1909 | Painters |
> | 354 | Plasterers |
> | 1031 | Roofers |
> | 1289 | Sheet Metal |
> | 145 | Tile Setters |
> | 2410 | Pipe Trades |
>
> "At the present time non-white youths comprise approximately fifteen percent of all registered construction apprentices."

Both Title VII and the Outreach program are faithful to the premise that the rules of selection for employment must, in this Court's words in *Griggs*, make "job • • • qualifications the controlling factor, so that race, religion,

nationality and sex become irrelevant," (401 U.S. at 436). Indeed, perhaps the most significant fact about Outreach is that it puts the lie to the counsel of despair and condescension that racial preferences, such as that instituted by the University of Washingon Law School, are necessary because minorities can not compete on the basis of qualifications. As Mr. Ross noted in another passage of the same speech:

> "Our experience convinced us that *fairly* administered tests and other qualifications which are relevant to job requirements are not insurmountable obstacles to the entry of minorities into apprenticeship. Indeed, we are very proud of the tutoring techniques we have developed to overcome the testing problem. In fact, we have now reached the point where in some cities our applicants are achieving higher test scores than all other applicants, white or black. For example, 73 percent of our applicants scored 'high' on a recent test which was given by the Steamfitters Joint Apprenticeship Committee in New York. We have now reached the point where our applicants are better at taking tests than the average applicants."

The answer, in other words, is not to abandon our commitment to the allocation of employment opportunities on the basis of merit, a course that would be inconsistent with the urgent need to maximize productivity and efficiency to meet the critical economic problem we now face, but to refine our measures of merit and to provide those who have not received a sufficient grounding in basic skills the compensatory tutoring necessary to enable them to compete on the basis of qualification.

It is, we suppose, possible, in theory, that a system of

equal opportunity embracing the principles stated in *Griggs* and *McDonnell Douglas* could survive affirmance of the holding below. But it is not even remotely likely that this would be the consequence. The pressure, by a significant number of policy makers, for sweeping, short-term solutions to the agonizing economic problems of the minority communities, without regard to the unfairness of such solutions to those like Mr. De Funis, who have both legitimate aspirations and substantial problems of their own, is too intense. In this area, as in others in our political life, the overriding recent trend has been to ignore the long-term costs of utilizing questionable means to achieve the end sought.

Yet, those long-term costs promise to be immense. In an address to the AFL-CIO's Eighth Constitutional Convention, some five years ago, Mr. Rustin pointed out the factor that these planners overlook—it is that this country faces a racial problem consisting of "two elements—black rage and white fear [that] feed on each other and set this nation on a collision course." Proceedings of the AFL-CIO's Eighth Constitutional Convention, pp. 105-106. Obviously neither this rage nor this fear can be pandered to insofar as it is irrational. The program the labor movement has evolved does not do so. But the white fears engendered by racial preferences are not irrational. And such preferences, while they may give the appearance of answering "black [or more broadly minority] rage," do not do so in a meaningful sense. As Mr. Rustin noted:

> "We don't want special categories labeled 'Negro carpenters' or 'Negro plumbers' who have lower skills and get less pay. We want Negroes who are carpenters

and plumbers—with the same skills and training and wages that everyone else has. We want the same pride in our trade that any worker with dignity wants. And we will not settle for less." *Id.* at 111.

That result can only be achieved by affording equal employment opportunities as we have defined that concept. It will not be achieved by a program of racial preferences.

It is because of the foregoing considerations that the AFL-CIO has sought this opportunity to present its views concerning this case to the Court.

ARGUMENT

The profound central lesson of the Fourteenth Amendment for this case, is, in the words of the brief *amicus* of the Anti-Defamation League of B'nai B'rith in support of the petition for *certiorari* (at pp. 11, 12, 16), that the:

> "Constitutionality [of racial classifications] turns on whether [they] work any deprivation, and even if not, on whether they are justified by a compelling interest, by 'some overriding statutory purpose,' *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964). 'Without such justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause.' *McLaughlin* v. *Florida*, *supra*, 379 U.S. at 192-93.
>
> • • • •
>
> "[A] compelling state interest sufficient to justify a racial classification can be shown only if the classification is undertaken in the course of administering a remedy for proven prior discrimination, • • • [so that the] remedy has followed with precision a wrong shown with precision in a record • • •, or at least if, while

serving an allowable state purpose, it imposes no deprivation on anyone."

That statement of the law is drawn from, and meticulously documented to, this Court's decisions. To avoid needless repetition we therefore incorporate the discussion of those precedents in that brief by reference, take the conclusion reached as a given, and devote ourselves herein to enlarging upon and refining the basic proposition quoted above.

1. In allocating the 145 to 150 openings in the first-year class, the University of Washington Law School applied its test of qualification, expressed in essence in a weighted formula, the "predicted first year average," so that black Americans, Chicano Americans, native American Indians or Philippine Americans, but not Asian Americans, were treated separately from, and more favorably than, applicants of other races. The qualifications of these "minority" applicants were compared only with others in that group, and not against the entire universe of applicants.

The result was that "minority" applicants were accepted who would have been summarily rejected but for their membership in that class. Juris. Stat. App. C. Finding XXIII. In all, 44 minority applicants were accepted, 38 of whom had qualifications lower than Mr. De Funis, the plaintiff-petitioner here, who is white, and who was not accepted. Thus, "the admissions of the less qualified [minority] students resulted in a denial of places to those [of other races] better qualified." Juris. Stat. App. C. Finding XXIV.

There can be no dispute, then, that the Law School utilized a racial classification in determining who should be accepted for its first year class. And it is equally clear that

this deprived Mr. De Funis, and others similarly situated, of a right to compete for placement in the Law School under *some* system of selection that does not discriminate against them on the grounds of race.

2. There is no showing here that this racial classification and preference for minority students is justified as a remedy, either for present discrimination, or for the present effects of past discrimination.

(a) The record is barren of evidence that the Law School was motivated by an intent to discriminate against minority applicants. And there is no evidence that the School's present rules of selection have discriminatory consequences for minority applicants. Those rules as applied equally to all had produced a student body with a racial mix approximately that of the state (B'nai B'rith Juris. Stat. Brief, p. 14), and were based on criteria that reliably predicted law school performance of both "minority" and majority students.

In a carefully considered and comprehensive decision, *Vulcan Society* v. *Civil Service Comm.*, — F.2d —, 6 FEP Cases 1045 (C.A.2, Nov. 21, 1973), Judge Friendly has reviewed the standards for judging the legality of testing procedures challenged as discriminatory:

> "In Castro v. Beecher, supra, 459 F.2d at 732, the First Circuit stated that
>
> 'The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance.'
>
> Judge Coffin later referred to the defendants' obli-

gation to 'come forward with convincing facts establishing a fit between the qualification and the job.' Id. *** [A] showing of a racially disproportionate impact puts on the municipal or state defendants not simply a burden of going forward but a burden of persuasion. *** But if the public employer succeeds in convincing the court that the examination was 'substantially related to job performance,' an injunction should not issue simply because he has not proved this to the hilt.

* * * *

"Cases like this one have led the courts deep into the jargon of psychological testing. Plaintiffs insist that the only satisfactory examinations are those which have been subjected to 'predictive validation' or 'concurrent validation,' preferably the former. The district court defined these terms as follows: 'Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired'; 'Concurrent validation requires the administration of the examination to a group of current employees and a comparison between their relative scores and relative performance on the job.' The judge wisely declined to insist on either. The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics. Experience teaches that the preferred method of today may be the rejected one of tomorrow. What is required is simply that an examination must be 'shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.' Griggs v. Duke Power Co., 401 U.S. 424, 431; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14. To be sure, an impressive showing of predictive validation may end the inquiry then and there, and one of concurrent validation may come close to doing so; thus these methods may well be preferable in that sense. But these two schemes have their own

difficulties, and the failure to use one of them is not fatal, at least from a constitutional standpoint, as long as the examination is properly job-related." *Vulcan Society*, 6 FEP Cases at pp. 1049, 1050, footnotes omitted.

In the instant case even the threshold showing—"racially disproportionate impact"—necessary to require justification of the Law School's qualifications criteria has not been met. And, in any event, the "demonstrable relationship to successful [school] performance," which must be proved on that showing, is, as we understand the record, universally acknowledged.

(b) We hasten to add that none of this is to say that the present criteria are the only lawful ones, or, indeed, that Mr. De Funis or any one else has a Fourteenth Amendment right to insist on these or similar rules of selection.

The law is a field as broad as human experience itself. The range of permissible performance-related admission criteria is correspondingly broad. The Law School retains the primary responsibility for the development of sensitive and accurate measures of qualification attuned to its educational mission as the School defines that mission. In Judge Friendly trenchant paraphrase: "The Fourteenth Amendment no more enacted a particular theory of psychological testing than it did Mr. Herbert Spencer's Social Statics." *Vulcan Society*, 6 FEP Cases at 1050. But that Amendment did enact a ban on rules of selection based on racial classifications.

(c) Even proof of past discrimination against minority applicants would not validate the racial classification here

which works a deprivation of the constitutional rights of the majority applicants.

Initially, it is difficult, at best, to give content to the concept of past discrimination by the Law School against the minority applicants who are the beneficiaries of this preference. A number of attempts, by a single individual, over a period of years, to gain admission to a law school is the rare exception. Almost without exception to speak of past discrimination in this context, as the court below recognized, is to speak of overall societal failures or failures at a lower rung in the educational ladder.

The policy of "remedying" such discrimination by substituting racial criteria for criteria "shown to bear a demonstrable relationship to successful performance," (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431), suffers from four fatal flaws:

First, "the individual [majority applicant who is not admitted] may have had no part in discrimination against blacks; to impose on him the costs of remedying societal discrimination seems unjust. It is all the more unjust since the burden would fall most heavily on whites who are themselves relatively deprived." *Developments In The Law —Employment Discrimination And Title VII Of The Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1116. To weight economic competition in this fashion against those who can not be said to have meaningfully participated in a wrong is impermissibly close to imposing punishment on the ground of "collective guilt," in effect creating "attaints of the blood" for all members of non-minority groups.

Second, such racial classifications:

"have serious countereducative effects. Gordon Allport

> has defined ethnic prejudice as 'an antipathy based upon a faulty and inflexible generalization.' A crucial objective of any antidiscrimination [program] must, then, be education; it must break down faulty racial stereotypes. Preferences, however, have the reverse effect. * * * [W]hite [applicants], resentful of being turned down * * * due to minority quotas, will only have their stereotypes reinforced by a government that proclaims blacks and other minorities to be in need of special advantages." *Ibid;* footnotes omitted.

Both of these factors, as we have pointed out (at pp. 3-4, 11-12 *supra*) tend to create and maintain legitimate white fears, thereby increasing social tensions and exacerbating the overall racial dilemma.

Third, the paternalistic grant of "benign" preferences serves to demean the recipient in his own eyes. The reinforcement of invidious stereotypes just noted is not confined to the majority applicants who are discriminated against. See McPherson, *The Black Law Student: A Problem of Fidelities,* Atlantic Magazine, April 1970, p. 88; Graglia, *Special Admission Of The "Culturally Deprived" To Law School,* 119 U. of Pa. L. Rev. 351, 353-359. By the same token this device tends to deprive minority applicants, who have in fact qualified on merit, of the full recognition for their achievement they richly deserve. See pp. 11-12 *supra.*

Fourth, it is a delusion to believe that the overall interests of society are advanced by diluting the reliance on qualification and relying on race in selecting those who will fill a limited number of positions (either in a professional school class or a job market). To the extent that well paying positions are plentiful and there is an economy of

abundance, modifying rules of selection in this manner may be of relatively little moment except to those directly and adversely affected. But neither of these conditions obtain. These are not times that allow the prodigal waste of scarce resources, the most valuable of which is "efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions," (*McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 801), responsive to the expectation that achievement brings rewards. Thus:

> "Many economists have suggested that in increasing equality, productivity should not be sacrificed. Instead, output should be maximized and changes made in the way that output is distributed. Such an approach is a more refined and efficient means of giving aid, since the beneficiaries can be identified more precisely and the true costs of the process can be computed with greater precision." *Developments—Title VII,* 84 Harv. L. Rev. at 1115.

The sum of the matter is that this racial classification is "an invidious discrimination forbidden by the Equal Protection Clause, (*McLaughlin* v. *Florida,* 379 U.S. 184, 193), because the guarantee of the "equal protection of the laws" can not be squared with a system that deprives members of one race of their rights in order to provide "recompense" to members of another.

This conclusion accords with that reached by Congress. Cf. *Katzenbach* v. *Morgan,* 384 U.S. 641. The problem here is in all essential respects that treated in Title VII, where Congress banned all employment discrimination against minority groups, (§§703(a)-(d)), *as well as preferences for*

them (§703(j)), and affirmed the lawfulness of job-related qualifications, (§703(h)). As this Court stated in *Griggs* 401 U.S. at 430-431 (footnote omitted):

> "The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. 420 F. 2d 1225, 1239 n. 6. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County* v. *United States*, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"

The critical difference between *Gaston County*, on the one hand, and *Griggs* and the instant case, on the other, is that in the former the method utilized to eradicate the

effects of past discrimination did not deprive any other voter of his rights, while in the latter, to substitute selection on the basis of race for selection on the basis of qualification does impinge on the rights of those not accorded the preference, because their opportunity to obtain one of a limited number of places is correspondingly diminished.

(d) The burden of the argument thus far has been that racial classifications that result in a preference, in securing one of a limited number of openings, to less qualified "minority" applicants over more qualified majority applicants, as measured by criteria "shown to bear a demonstrable relationship to successful performance," (*Griggs*, 401 U.S. at 431), do not meet the requirements of the Constitution. There is a contrary line of authority in the lower federal courts upon which the court below relied. The most recent decision in that line is *Associated General Contractors* v. *Altshuler*, ——F. 2d——, 6 FEP Cases 1031 (C.A.1, Nov. 30, 1973), which cites and analyzes the earlier cases.

In *Altshuler*, the court sustained the validity of a requirement, imposed by the Commonwealth of Massachusetts, upon contractors engaged in publically funded construction, that the contractor must:

> "'. . . maintain on his project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to total employee man hours in each job category. . . .'"
>
> • • • •
>
> "The Secretary of Transportation and Construction

> for the Commonwealth, who is charged with enforcing [this] provision, interprets [it] to mean that [the Commonwealth] requires the hiring of only 'qualified' workers."

Contractors who do not meet this ratio are subject to sanctions unless at a hearing they demonstrate that they have taken "every possible measure to achieve compliance." 6 FEP Cases at 1014.

The First Circuit recognized that:

> "The Commonwealth's affirmative action plan forces us to address a fundamental question: are there constitutional limits to the means by which racial criteria may be used to remedy the present effects of past discrimination and achieve equal opportunity in the future?" 6 FEP Cases at 1019.

The answer it proposed was that rules of selection may be based on racial criteria so long as these do not require preference to "unqualified minority workers," and so long as the employer is granted the opportunity to prove that the only reason he did not meet his assigned "goal" is that to do so he would have been required to hire "unqualified minority workers." 6 FEP Cases at 1019-1021. This was in essence the approach of *Contractors Ass'n. of Eastern Pa.* v. *The Secretary of Labor*, 442 F.2d 159 (C.A.3) cert. denied 404 U.S. 854, where the court relied upon the assertion that the goals and timetables for minority hiring there set would not "eliminat[e] job opportunities for white tradesmen," (422 F.2d at 173).

But, neither the First Circuit, nor the Third Circuit (or the other of the lower courts that have embraced this position), have explained the justification for discriminating in

favor of less qualified "minority" workers and against more qualified majority workers. This is undoubtedly because no justification exists. The harm to the majority worker who is thereby unemployed is precisely the same. (It is, in fact, precisely the same as the harm visited upon a more qualified "minority" worker who is rejected on racial grounds in favor of a less qualified majority worker.)

This Court has therefore emphasized that:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant." *Griggs*, 401 U.S. at 436.

Equally [illegible], it is not constitutionally sufficient that the better qualified worker had an attenuated opportunity for a job, rather than having his job opportunities "eliminated". For, his right is to a system of selection embodying "fair and racially neutral employment and personnel decisions," (*cf., McDonnell Douglas*, 411 U.S. at 801).

(e) The conclusion that the decision below, and kindred decisions such as *Altshuler*, are wrongly decided does not "provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox." *Griggs*, 401 U.S. 431. The argument pressed here rests on the premise that, if a method of selection "which operates to exclude Negroes cannot be shown to be related to • • • performance, [it] is prohibited." *Ibid.* Moreover, organized labor's entire response to the challenge of providing equal employment opportunity is predicated upon the recognition: first, that the range of affirmative action open to

enable "minority" Americans to meet performance-related rules of selection is, and should be, all but unlimited; and, second, that affirmative action, in this sense, does work. See pp. 5-10 *supra*. But we do insist that Government may "not command that any person be [preferred] simply because he was formerly the subject of discrimination, or because he is a member of a minority group," and that the Constitution does forbid "discriminatory preference for any group, minority or majority," (cf., *Griggs*, 401 U.S. at 431).

CONCLUSION

For the reasons set out above, as well as those stated by the petitioners, and the other *amici* supporting their position, the decision below should be reversed.

Respectfully submitted,

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January, 1974.

SUPREME COURT, U. S.

FILED
JAN 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-235

MARCO DE FUNIS, *et al.*,
Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,
Respondents.

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AMICUS CURIAE.

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Gunthorp-Warren Printing Company, Chicago • 346-1717

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OPINIONS BELOW.

The opinions of the Supreme Court of Washington are reported at 82 Wn. 2d 11, 507 P. 2d 1169, and are reprinted as Appendix A to the petitioner's Jurisdictional Statement or in the Alternative Petition for Certiorari.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). Certiorari was granted on 19 November 1973.

CONSENT OF THE PARTIES.

Both petitioners and respondents have graciously consented to the delayed filing of this brief, and their letters of consent are on file with the Clerk of this Court.

QUESTIONS PRESENTED.

The questions presented in this case are two:

1. May a State establish racial quotas for the admission of students to its law school?

2. May a State, which cannot constitutionally discriminate on racial grounds against black applicants to its law school, constitutionally discriminate on racial grounds against white applicants to its law school?

CONSTITUTIONAL PROVISION.

The Fourteenth Amendment to the Constitution of the United States provides:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICUS CURIAE.

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews. The Anti-Defamation League was organized in 1913 as a section of B'nai B'rith to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States.

Among its many other activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws and practices in such cases as, *e.g.*, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Colorado Anti-Discrimination Commission* v. *Continental Airlines, Inc.*, 372 U. S. 714 (1963); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunt-*

ing Park, Inc., 396 U. S. 229 (1969); *San Antonio Independent School District* v. *Rodriguez*, 441 U. S. 1 (1973).

The "numerus clausus," the racial quota that is involved in this case, is of particular concern to the Jewish minority in this country because of the long history of discrimination against Jews by the use of quotas, both in Europe and in the United States. See, *e.g.*, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, A REPORT OF THE PRESIDENT'S COMMISSION ON HIGHER EDUCATION 35 (1947); S. KENNEDY, JIM CROW GUIDE TO THE U. S. A. 92 (1959; 1973); Steinberg, *How Jewish Quotas Began*, 52 COMMENTARY 72 (1971). See also G. KISCH, THE JEWS IN MEDIEVAL GERMANY: A STUDY OF THEIR LEGAL AND SOCIAL STATUS (2d ed. 1970); J. MARCUS, THE RISE ANE DESTINY OF THE GERMAN JEW 11 (1934); S. SEGAL, THE NEW POLAND AND THE JEWS 197 (1938); L. KOCHAN, ed., THE JEWS IN SOVIET RUSSIA SINCE 1971 1-2, 17, 90, 91, 92, 94, 146 (2d ed. 1972); S. BARON, THE RUSSIAN JEW UNDER TSARS AND SOVIETS 57 (1964). Because of the importance to all groups within the American society of the questions presented by this case, an argument on behalf of any one group would be inappropriate. It may, nevertheless, be noted that after only 30 or 40 years of open admissions, the universities which, for centuries, set the style in excluding or restricting Jewish students, may, again be able to do so, again in the name of enlightenment, if the Washington decision is not reversed. See, *e.g.*, Steinberg, *How Jewish Quotas Began*, 52 COMMENTARY 72 (1971); Kramer, *What Lowell Said*, THE AMERICAN HEBREW 394 (1923).

STATEMENT.

Petitioner Marco DeFunis, applied for and was denied admission to the 1974 class commencing September, 1971 of the University of Washington Law School, the only law school

operated by the State of Washington. (Rev. Code of Washington, Ch. 28B.20) Thereupon DeFunis, his wife, and his parents brought suit in the Superior Court of the State of Washington, seeking an order that DeFunis be admitted on the ground that the procedures by which he was excluded were racially discriminatory. Following trial, the Superior Court ordered the admission of DeFunis. Pursuant to the court's order, he was enrolled as of September 22, 1971. The University appealed. On March 8, 1973, the Supreme Court of Washington reversed the order to admit DeFunis. On June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of the judgment of the Washington Supreme Court pending disposition of an appeal or petition for a writ of certiorari in this Court.

Enrollment in the University of Washington Law School is limited overall to 445 students. The size of the entering class is dependent on the residual number after second and third-year students who continue in good standing are counted. In 1971, the number of places open in the first-year class was a maximum of 150. There were 1,601 applications.(St. 33-35.)*

The task of filling the places available in the first-year class was assigned to an admissions committee consisting of five faculty members and two students. (St. 330.) A "Guide for Applicants" issued by the law school described the admissions process that had been applied the previous year and announced that the law school anticipated it would "be applied in determining membership in the [entering] class of 1971." The Guide stated:

> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to to make significant contributions to law school classes and to the community at large.
>
> We gauged the potential for outstanding performance in law school not only from the existence of high test scores

* "St." refers to the Statement of Facts, which in this record contains the transcript of testimony.

and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions. (Defendants' Exh. 45.)

While two general, non-racial factors in the admissions process were thus announced: (1) "potential for outstanding performance," and (2) "ability to make significant contributions to law school classes and to the community at large," testimony by the chairman of the admissions committee made it clear that the second factor was definitely subordinate, if indeed it had any substantial weight at all. The committee, its chairman explained, "proceeded in a fashion of trying to identify those individuals that it thought had the highest probability of success in law school with a possible secondary qualification of selecting from among those individuals on the basis of people who might make outstanding contributions to the law school classes under the law school community." (St. 360.)

In practice, the admissions process worked as follows. The committee had before it transcripts from all schools and colleges previously attended by the applicant, his score on the law school admissions test, which is nationally administered, letters of recommendation, and a statement by the applicant himself. (St. 338; 22.) By means of a formula combining the applicant's score in the law school admissions test and his junior and senior year college grade averages, a law school

predicted first-year average was established. (St. 360; 56; 181; 357.) All applicants whose predicted first-year average was 78 or above (the highest was 81), and a very high percentage (93 out of 105) of applicants with a predicted first year average between 77 and 78 were admitted. (Defendants' Answers to Interrogatories, Tr. 44.*)

Applications showing a score above 77 were thus treated almost automatically, on the basis simply of the numerical score. The same automatic treatment was afforded applications showing a score of 74.5 or below, but only if they were not applications of black Americans, Chicano Americans, native American Indians, or Philippine Americans. If not coming from these four groups, applications with a score of 74.5 or below were examined by the chairman of the admissions committee alone. Except in the case of applications of returning military veterans who had been admitted in earlier years, and with the exception also, as he testified, of "maybe one or two cases outside of the military area," the chairman of the admissions committee rejected all these low-score applications out of hand. Thus, as of August 1971, when the admissions process was virtually complete and some 275 acceptances had been sent out (allowing for non-acceptance among those invited), only nine applicants who were not Chicano, Indian, or Philippine and who had scores of 74.5 or below had been admitted, and these were overwhelmingly cases of returning veterans. (St. 340-41; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

There was thus left a residual category of applications, which was divided into two groups. The first was the group of applications showing predicted first-year averages below 77 (with a few 77's included during the latter part of the process) (St. 340), but above 74.5, where the applicant was not black American, Chicano American, native American Indian, or Philippine American. This was the group that included DuFunis, whose score was 76.23. The second group consisted of ap-

* "Tr." refers to the Transcript of Record on Appeal to the Supreme Court of Washington.

plications of black Americans, Chicano Americans, native American Indians, or Philippine Americans regardless of the predicted first-year average so long as it was below 77, which included all but possibly one such application.* If it qualified on the basis of race, it did not matter that an application showed a score of 74.5 or below. It was put in this second group, rather than being consigned to the chairman of the admissions committee for summary disposition. Actually, 30 minority-group applications showing a score of 74.5 or below were eventually accepted. (St. 340-42, 351; Defendants' Exh. 44, p. 2; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

Files in the first of these two residual groups—applicants who were not black, Chicano, Indian, or Philippine but whose averages fell between 77 and 74.5—were assigned to committee members at random for examination and report to the full committee, where they were acted upon. The second group, consisting of all but possibly one of the black American, Chicano American, native American Indian, and Philippine American applicants, were treated distinctly and separately. Having explained that two groups were left over after the virtually automatic admission of the high-score applicants and the virtually automatic exclusion of non-minority applicants with a score of 74.5 and below, and that these two groups formed a residual category, the chairman of the admissions committee testified: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate con-

* Defendants' Exh. 44, p. 2, shows that one black applicant (and no Chicano, Indian, or Philippine applicant) had a score higher than DeFunis's 76.23. But we are not told whether this black applicant's score was as high as 77 or above. Comparing Schedule A to Defendants' Answer to Interrogatories (Tr. 48-53), with Exhibit 44 makes plain that the listing of minority group members in Schedule A includes Asians other than Philippine Americans. Such other Asians received no preferential treatment and did not form part of the second group discussed in the text. The score of the black applicant in question cannot be determined from Schedule A.

sideration." (St. 344.) Files of black applicants were sent to a sub-committee consisting of a black law student and a faculty member who had worked during the previous summer with a special federally-funded program for training disadvantaged college graduates interested in a career in law. (St. 359.) Files of Chicano Americans, native American Indians, and Philippine Americans were sent to an associate dean for review. The sub-committe for black applicants and the associate dean who reviewed other minority files reported back to the full admissions committee with recommendations for acceptance and rejection. (St. 352, 121-26.)

Files in this separately treated group of black Americans, Chicano Americans, native American Indians, and Philippine Americans were compared only with each other and not with the other applications passed upon by the committee or by its chairman individually. "Our notion in separating that category," the chairman of the admissions committee testified, "was an attempt to try to compare, to the extent we could, applications that were essentially comparable, that is, we wish to treat and consider the minority applications in the context of examining minority applications rather than sprinkled throughout a group of simply the entire group of applications to the law school." (St. 351; St. 399.) The effort was to find "within the minority category, those persons who we thought had the highest probability of succeeding on law school." (St. 353.) The reason for including a black student in the sub-committee to which files of black applicants were assigned was the admissions committee's "assumption . . . that a black person can better interpret the experiences and background and educational opportunities that a black has been exposed to than a white person can." (St. 402.)

By the method described, 37 black American, Chicano American, native American Indian and Philippine American applicants were offered admission to the law school.* Of the

* The trial court found that 44 Afro-American, Asian-American, Chicano-American, and American Indian applicants were admitted

37, one had a predicted first-year average higher than petitioner De Funis's 76.23. Thirty-six had predicted first-year averages below De Funis's. Thirty of them, as already noted, had averages below 74.5, and but for their racial classification would have been summarily rejected. There were other applicants also who were admitted with first-year predicted averages below that of petitioner De Funis, 23 of them as returning veterans who had previously been admitted, and 25 for other reasons that commended themselves to the discretion of the admissions committee. The lowest score for a non-minority group applicant who was admitted was 72.72. Twenty-four minority applicants were admitted with scores below that. (Defendants' Exh. 44; Defendants' Answers to Interrogatories, Schedule A, Tr. 48-52.)

The predicted first-year average was not the sole admissions criterion employed by the law school, but the record is clear that taking all criteria into account, in the law school's own judgment, its minority-preference program resulted in the admission, in the aggregate, of students acknowledged to be less qualified than others who were not members of the designated minority groups and who were, therefore, rejected. The dean of the law school testified that "we do not want to go to the point where we are taking people who are unqualified in an absolute sense, and that is that they have no reasonable probable likelihood of having a chance of succeeding in the study of law with such academic supportive assistance that we can give them." (St. 420.) But he testified candidly that "I would be misleading you, I think, if I suggested" that minority students with low credentials who are admitted are "necessarily as likely to succeed in the law school curriculum as certain of the ma-

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as "minority" students, and we referred to this finding at p. 6 of our Brief as *Amicus Curiae* in Support of Jurisdictional Statement or in the Alternative Petition for Certiorari. The figure used by the trial court includes Asian Americans other than Philippine Americans who were in fact subjected to no special or separate admissions process but were treated in ordinary fashion in common with non-minority applicants. (St. 352; Defendants' Exhibit 44.)

jority students who are not admitted." (St. 418.) And defining the term "qualified" as indicating "the likelihood or probability [that] the student has the potential for successful study of law according to our curriculum," the dean added: "On that basis, we do take, in my opinion, some minority students who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole." (St. 423.) There followed this colloquy:

> Q. Of these who have made application to go to the law school, I am saying you are not taking the best qualified?
> A. In total?
> Q. In total.
> A. In using this definition, yes. (St. 423-24.)

The chairman of the admissions committee testified that there was no fixed quota determining the number of minority students to be admitted by the special, separate process adopted by the law school. (St. 353.) But there was, if not a precise number, then a zone or an order of magnitude. As indicated above, the policy was not to take applicants who were unqualified in the absolute sense that they had no reasonable chance of succeeding, even with supportive assistance. It was in that sense, in the sense of resisting the temptation to "say we are going to take X number of black students no matter what," that the dean testified: "We do not have a quota. . . ." But at this point also he added: "We want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense. . . ." (St. 420.)

The stated rationale for the minority-preference policy was that the minority racial and ethnic groups whom the law school now sought to provide with a "reasonable representation" were those which had been "historically suppressed and excluded from participation in what might be thought of I suppose, the main stream of our society, and certainly in participation in the legal arena." (St. 416.) But there is no evidence in this

record, or in any materials outside the record we have been able to find that might be suitable for judicial notice, of discrimination against the four groups in question by the University of Washington. The President of the University, pledging in a speech to students that the University would make "special provision for disadvantaged black Americans," gave as the reasons for the policy the existence of slavery in the United States until the Civil War and "the history after slavery of a hundred years of separate and unequal treatment," which he said would have to be "matched by at least some years of separate and unequal treatment the other way if the situation is to be remedied." (Defendants' Exh. 13.) There is thus no indication of consciousness on the part of officials of the University of separate and unequal or otherwise discriminatory treatment of the groups in question at the University of Washington or in the State of Washington. The record shows only that for the year 1969-70, the University of Washington Law School reported an enrollment of eight black students out of a total of 356. (Defendants' Exh. 7.) That comes to approximately 2.2%, and compares favorably with a percentage of blacks in the population of the state of Washington, which is 2.1, and in the populations of the neighboring states of Oregon, Idaho, and Montana. See *United States Bureau of the Census, Census of Population: 1970, General Population Characteristics,* Washington, Final Report PC (1)-B49, Table 18; Idaho Final Report PC (1)-B14, Table 18; Montana, Final Report PC (1)-B29, Table 18.

Nor is there any showing in this record that the criteria used for admission, and particularly the first-year average, are not probative of qualification and therefore operate to discriminate against certain groups on the basis of race or ethnic origin. Cf. *Griggs* v. *Duke Power Co.,* 401 U. S. 424 (1971). On the contrary, as noted earlier, it was conceded that the result of diluting these criteria was the admission of relatively less qualified applicants. There is testimony in the record —opinion evidence—that groups that have been handicapped

over a long period of time "by virtue of economic and other circumstances" and that have not had "the educational condition and economic advantages for education [of] members of other groups" are in a different position from those other groups because: (1) they "may not [have been] exposed to the same kind of emphasis on certain skill developments and so on," and (2) "our usual methods for evaluating applicants are not particularly accurate" as to them. Some of the indicators used, said the dean of the law school, "have a margin of error even as to students from the major culture, and we know that as to students from these minority cultures, they may be even less reliable." (St. 416-17; see also St. 73-74.)

This assumption, it is clear, underlay the minority-preference policy. But it is equally clear on this record that this assumption amounted to absolutely nothing more than the judgment, acknowledged by the dean of the law school as noted above, that applicants admitted under the special minority-preference program were in the aggregate less qualified than other applicants admitted in the regular course, and than some applicants who were rejected. The law school neither abandoned the criteria by which it judged qualifications, however imperfect, nor so far as this record shows evolved and applied any special criteria, specially suitable to the groups in question and capable of assessing their qualifications as rigorously as those of other applicants were assessed. The assumption that the criteria normally used were less than usually accurate with respect to the groups in questions turns out on this record to be nothing more than an assumption that owing to various conditions of deprivation applicants admitted under the minority-preference policy were less qualified than other applicants.

Moreover, there is no pretense in this record that the assumption of cultural and economic disadvantage as applied to any particular individual applicant rested on anything but his race, or that the contrary assumption, namely, that an applicant had had the normal cultural and economic advantages, in turn

rested on anything but the applicant's race. Nothing in this record indicates that membership in one of the four racial groups that received preferential treatment correlates with cultural and economic deprivation, or that any effort was made to find such a correlation. And the evidence is clear that no effort was made to examine the mass of applications for indications of cultural or economic deprivation, whatever the race of the applicant.

The dean of the law school referred to the term, "cultural disadvantage," as a sort of "cloak of language" (St. 417.), and when asked to define the difference between a minority group and a culturally disadvantaged person or group, he replied that "the semantics of this whole thing are something of a problem." (St. 424-25.) There is in this record a fully candid recognition that the law school admissions policy singled out for separate treatment applications of certain persons solely on the basis of race, and judged them more indulgently than other applications. On this record, therefore, the assumption of economic and cultural disadvantage, as a rationale for the minority-preference policy merges into the rationale of historic conditions of oppression and discrimination.

An alternate and broader possible rationale is explicitly disavowed in this record. The law school, the chairman of the admissions committee testified, did not pursue a general policy of trying to achieve a balanced class. "About the only thing, I suppose," he said, "that can be said in this direction is, of course, the policy with respect to the representation within the law school community of minority students, if that, in some sense, can be considered an issue of class balance; negatively, I suppose, in negating the general overtones of class balance, the committee did not proceed to, with respect to any stated policy, certainly with the view of trying to procure certain numbers of individuals from various parts of the United States, from various employment skills, from various undergraduate majors, or any of the other numerous possible means that one could have for saying a class has balance." (St. 360.)

On this record, the trial court ordered DeFunis's admission on the ground that he had been excluded only by reason of his race.

The Supreme Court of Washington reversed the judgment of the trial court. The Supreme Court held that plaintiff had standing to raise the issues presented, and that the case was not moot. 507 P. 2d at 1177, n. 6. Coming to the merits, the court held that the law school's admissions policy did not constitute invidious and stigmatizing discrimination any more than did the color-conscious policies mandated, and in a dictum permitted, by this Court in *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 16 (1971), or by certain decisions of lower federal courts such as *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. denied*, 416 U. S. 950 (1972); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), *cert. denied*, 402 U. S. 944 (1971); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3d Cir. 1971)), *cert. denied*, 404 U. S. 584 (1971). Nevertheless, the Washington Supreme Court held, a compelling state interest must be shown in order to justify classifications based on race. It found such compelling state interests in: (1) The elimination of "racial imbalance within public legal education," 507 P. 2d at 1182, having regard to the fact that racial minorities are as fully taxed as anyone else for the support of public education, including public legal education; (2) The production of "a racially balanced student body at the law school," 507 P. 2d at 1184, which may be considered necessary by educational authorities in order to train lawyers fully competent to practice in the American multi-racial society; (3) The alleviation of a nation-wide "shortage of minority attorneys." 507 P. 2d at 1184.

It had been suggested, the court said, that these compelling state purposes could be served by improving elementary and secondary education of minority students so that they could

secure equal representation by having their applications to law school considered competitively, with no need for preferential consideration. Such a program, the court went on, would not work effectively in the foreseeable future. Consequently there were no less restrictive means available that would serve the state's compelling interest as effectively as a preferential minority admissions policy.

The court noted that underlying the law school's admissions policy was the assumption that certain racial groups had been historically suppressed and disadvantaged. But the court did not appear to view this assumption, which it shared, as in itself constituting a compelling state interest. The court also set aside as not relevant for purposes of decision of the case questions whether *de jure* or *de facto* discrimination had existed at the University of Washington.

The court held further that there was no denial of equal protection in that feature of the law school's policy which singled out only certain racial groups, since in light of the purpose of the policy the racial classification did not need to include all racial minority groups. Finally the court held that the law school's admissions procedures and their application did not constitute arbitrary and capricious administrative action. Predetermined standards and procedures were used, but a numerical criterion was not the only one that was employed. The numerical criterion was departed from for reasons having to do with race, but in other cases for other reasons as well, including the likelihood that an applicant would make a contribution to the law school and to the community at large following graduation.

Justice Wright, while joining the majority opinion, filed a brief concurrence emphasizing the point that a "law school admissions program should not and need not be based upon purely mathematical factors." 507 P. 2d at 1188. Justice Finley and Stafford, who had also joined in the opinion of the court, joined in Justice Wright's concurrence as well.

Chief Justice Hale, with whom Justice Hunter joined, filed a dissent. The law school's admissions program violated the 14th Amendment, Chief Justice Hale maintained, and could not be sanctioned by the holdings of any of the cases relied upon by the majority. "The circle of inequality cannot be broken," said the Chief Justice, "by shifting the inequities from one man to his neighbor." 507 P. 2d at 1189. The Chief Justice also regarded the administration of the law school's admissions policy as being capricious and arbitrary even aside from its preferential feature based on race. Justice Hunter also added a brief dissenting opinion making the same point. 507 P. 2d at 1200.

SUMMARY OF ARGUMENT.

Marco DeFunis was not permitted to compete for all of the places in the entering class of the University of Washington Law School. He was excluded solely because of his race from a significant number of places which were set aside and reserved for other races. Had DeFunis been black, Indian, Chicano or Philippine, such exclusion would have been unconstitutional. (Indeed if DeFunis were any of these, most of those appearing against him here would be his champions instead of his adversaries.) If the Constitution prohibits exclusion of blacks and other minorities on racial grounds, it cannot permit the exclusion of whites on racial grounds. For it must be the exclusion on racial grounds which offends the Constitution, and not the particular skin color of the person excluded.

For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are now to be more equal than others. Having found

support in the Constitution for equality, they now claim support for inequality under the same Constitution. This is the classic hard case making very bad law.

A state-imposed racial quota is a *per se* violation of the Equal Protection Clause because it utilizes a factor for measurement that is necessarily irrelevant to any constitutionally acceptable legislative purpose. A racial quota is a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit.

There was a finding by both courts below that the State of Washington used racial criteria to exclude DeFunis from admission to the State's law school. Exclusion from a state law school on the basis of race has long since been declared by this Court to be unconstitutional.

The only justification for use by a state of a racial classification is its use to cure or alleviate specific, illegal racial discrimination. There is no basis in this record even to suggest earlier illegal racial discrimination to be remedied by the racial quota adopted by the law school here.

Even if a racial quota were not, *per se*, a violation of the Equal Protection Clause, like any racial classification it was not available for use by a state in the absence of a "compelling state interest." There is no "compelling state interest" shown on this record.

ARGUMENT.

The Racial Quota Utilized by the Law School of the University of the State of Washington Is a Violation of the Equal Protection Clause of the Fourteenth Amendment.

The facts have been set out in detail in the above Statement in order to reveal the true nature of the racial quota system for admissions adopted by the University of Washington Law School. The size of the class was fixed within approximately

five places. There was no suggestion that class size was expandable. (St. 115, 333-34.) Minority and majority applicants, as those terms were defined by the law school, went through separate, segregated admission procedures. (St. 351; 359; 399; 402.) As the chairman of the admissions committee stated: "The residual category, and let me segregate—segregate is the wrong word, but minorities were put aside for separate consideration." (St. 344.) The most desirable students were chosen within each of the two groups. (St. 353; 420.) But the candidates in one group were never considered in competition for the places allotted to the other group. (St. 353; 399.) The number of places allotted to minority applicants was changed from year to year by as inconspicuous a decision as possible. But a quota is no less a quota because it is not labelled as such or because it is subject to annual adjustment. (St. 416; 420.)

The use of the quota system—the segregation of two groups of applicants by race with admission for each group limited to its assigned numbers—makes it clear that this is not simply a case where race was used as one among many factors to determine admission. Instead, the law school used race as the criterion for imposing entirely separate admissions procedures. The class that entered the University of Washington Law School in 1971 was in fact two classes, distinguished in terms of racial attributes, one of "minority" students and the other of "majority" students, recognized and chosen as such by the University. To the extent that a place was assigned to one group, it was inaccessible to a student from the other group. What was demonstrated by the law school here was not a form of integration of races but rather a form of segregation of the races.

Never, since this Court struck down what Mr. Roy Wilkins has called a "zero quota" (N. Y. Post, 3 March 1973) in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), has a racial quota been approved by this Court. Both proponents and opponents of integration have recognized such quotas as *per se*

violations of the Equal Protection Clause that cannot be justified. That is why respondents try to assert that what is involved here is not a "quota." For a quota is not merely a racial classification. It is an attribution of status—of caste—fixed by race. A quota necessarily legislates not equality, but a governmental rule of racial differences without regard to an individual's attributes or merits.

This is made clear by the fact that the "minority" applicants were not judged by different criteria for admission than were applied to the "majority" candidates. The predictive factors for measuring potential success in law school were the same for both groups. What was different was the law school's ruling that "minority" candidates, because of their race, could not be expected to meet the higher standards established for "majority" students, without any regard to be given to individual capacities. Here lies the inherent evil of quotas that reverse the objective of Anglo-American democracies to move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society.

I. Any Racial Classification by a State Is Presumptively Invalid Under the Equal Protection Clause of the Fourteenth Amendment.

A generation ago, this Court held that the exclusion of a black applicant from a state university law school solely because of his race was a violation of the Equal Protection Clause. *Sweatt* v. *Painter*, 339 U. S. 629 (1950). The Court is, nevertheless, asked here to hold that the exclusion of a non-black applicant from the law school of the State of Washington, solely because of his race, is a valid racial classification. We respectfully submit that the rule of equality mandated by this Court in *Sweatt* v. *Painter* compels the reversal of the judgment of the Supreme Court of Washington in this case.

It has long been established that a racial classification imposed by "official state sources," *Loving* v. *Virginia*, 388 U. S.

1, 10 (1967), is presumed to be invalid under the Equal Protection Clause.

> [W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499; and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose. *Hirabayashi* v. *United States*, 320 U. S. 81, 100. (*McLaughlin* v. *Florida*, 379 U. S. 184, 191, 192 (1964).)

Racial discrimination is not justified because the burden of the state action falls on both races or all races so classified. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948).

There is no question here but that DeFunis's exclusion from the state law school was a result of a racial classification. The trial court ordered DeFunis's admission for that reason. Nor did the Supreme Court of Washington disagree with the lower court that the law school had used a racial classification to exclude DeFunis. Rather, it announced that, in ostensible conformity with the commands of this Court, "the burden is upon the law school to show that its consideration of race in admitting students is necessary to the accomplishment of a compelling state interest." (507 P. 2d at 1182.)

In short, the controversy in this Court is not over the question whether a racial classification was used as the basis for the exclusion of DeFunis, but whether that otherwise unconstitutional racial classification was validated by "a compelling state interest."

It is our position that a racial classification that takes the form of a racial quota, as in this case, is unconstitutional *vel non*, because racial quotas are anathema to the concept of individual freedom. But we submit that even if a racial quota does not fall into a special invalid category of its own giving rise to an irrebuttable presumption of violation of the Fourteenth Amendment, the racial classification here cannot be validly imposed within the limits of the Equal Protection Clause.

II. A Racial Classification by a State Is Invalid Under the Equal Protection Clause Except as a Specific Remedy for Specific Unconstitutional or Illegal Racial Discrimination.

Not since *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), and *Korematsu* v. *United States*, 323 U. S. 214 (1944), has this Court permitted the use of race as a factor for classification, except to cure an earlier illegally imposed racial discrimination. And even in those cases in which this Court has sanctioned such limited cognizance of a racial factor, the use of the racial factor has been condoned only to assure the elimination of the illegal discrimination and never as a tool for "reverse discrimination" of the kind sought to be justified by the Washington Supreme Court here. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430-31 (1971).

The Washington Supreme Court rested heavily on a dictum of this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971), which affords no support for the conclusion reached by the state court. At most, *Swann*, in its context of remedial litigation, suggested that a school system might provide for the distribution of students already in the system in the relative proportions of the races in the school system as a whole.

Indeed, the Washington Supreme Court recognized that the use of "race" in *Swann* was justified only "to prevent the perpetuation of discrimination and to undo the effects of past segregation." (507 P. 2d at 1180.) But it failed to recognize

that there was no showing on the record in this case of any pas discrimination by respondents that purported to be remedied by tne law school's use of a racial quota. Nor did it seem to understand that *Swann* did not endorse a "fixed racial balance or quota" even in the presence of a clear demonstration of prior discrimination. *Winston-Salem/Forsyth County Board of Education* v. *Scott*, 404 U. S. 1221, 1227 (1971).

It is equally important to see that in *Swann*, and other cases dealing with segregation in public schools, the contemplated remedy—a remedy for specific racial discrimination—is a reassignment of students within the system. The "racial balances" involved in those cases denied no white or black, Indian or Asiatic, education at a state school. Here, however, the law school's admission process flatly denied access of white students, including DeFunis, to state educational facilities in order to make them available to others of different race, because of their race.

Each of the cases cited by the Washington Supreme Court to justify the racial discrimination indulged by the law school here, *e.g.*, *Swann, supra; Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir., 1970); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir., 1971), tolerates the use of a racial standard by the state, but only to cure racial discrimination imposed by the party against whom the remedy is ordererd. In this case, however, there is nothing in the record on which to base a finding of unequal treatment by race in the University of Washington, or, indeed, in the State of Washington.

Generalized historical assertion about conditions somewhere in the United States some time in the past is not the premise of the remedial discrimination cases decided by this Court, nor should it be. If such a predicate were allowed to replace careful, specific findings of discrimination as the necessary condition for sustaining reverse discrimination, such state racial preferences would be constitutionally sanctioned in a wide range of circumstances that would denigrate if not destroy the concept of

racial equality specified in the Equal Protection Clause. Nor, in the light of our history, see, *e.g.*, G. MYERS, A HISTORY OF BIGOTRY IN THE UNITED STATES (rev. ed. 1960), would such "benevolence" be limited to those few "minorities" singled out by the State of Washington here. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving* v. *Virginia*, 388 U. S. 1, 10 (1967).

We submit that the use of race as a standard for the elimination of specific prior racial discrimination permits only the elimination of specific prior racial discrimination and not a substitution of racial discrimination against others.

III. The "Benign" Intent of the Framers of the Racial Quota Here Cannot Save It. The Validity of State Racial Discrimination Is Measured by Effect Not Motive.

It is argued that the racial quotas adopted by the law school here are not "invidious" because their purpose was "benign." But respondents' purpose in effecting its racial quota system is irrelevant. It is not the purpose but the effect of a racial classification that commands its invalidation. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971). This is a lesson that this Court has continuously declared. For example, in *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 462 (1972), the Court answered "Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect." And in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725 (1961), the Court said: "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

The Supreme Court of Washington conceded that "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." (507 P. 2d at 1182.) Since it is the "nonminority student" who is the victim of this invalid racial classification, that should suffice to dispose of the argument of the benign nature of the racial classification. But there is even reason to doubt the State court's notion that the evil of a racial quota does not stigmatize the "minority student" who gains admissions under such circumstances. For there is certainly the great possibility of that consequence, especially where, as under the law school's admissions program, the lower admission standards for "minority students" were such a well-publicized element. (St. 418; Exh. 45.) A recent black graduate of a law school put the problem cogently:

> Traditionally, first-year law students are supposed to be afraid, or at least awed; but our fear was compounded by the uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates knew that we were not, and like certain members of the faculty, had developed paternalistic attitudes toward us. (McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC 88 (April 1970).)

The quota system is admittedly not "benign" so far as the excluded majority applicants are concerned. There is little or no basis for suggesting that it is not "invidious" and "stigmatizing" for the category of applicant labelled by race as incapable of meeting the standards applied to others. See Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 353-59 (1970).

Indeed, a racial quota is always stigmatizing and invidious, particularly when it is applied to areas concerned with intellectual competency and capacity.* This is so essentially for the

* It is suggested that such a statement lacks sincerity if made by a non-black. And so we have attached as an Appendix to this brief a copy of a nationally syndicated interview with Dr. Kenneth Clark, no stranger to this Court's decisions, which confirms the position advanced by us here.

reasons stated by Professor Thomas Sowell in his book BLACK EDUCATION, MYTHS AND TRAGEDIES 292 (1972):

> [T]he actual harm done by quotas is far greater than having a few incompetent people here and there—and the harm that will actually be done will be harm primarily to the *black* population. What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don't have it*, and that they will have to be *given* something in order to have something. The devastating impact of this message on black people—particularly black young people—will outweigh any few extra jobs that may result from this strategy. Those black people who are already competent, and who could be instrumental in producing more competence among this rising generation, will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.

A racial quota is derogatory to those it is intended to benefit and depriving of those from whom is taken what is "given" to the minority. A beneficent quota is invidious as it is patronizing.

IV. There Are No "Compelling State Interests" to Justify the Racial Quotas Used by the Respondents to Determine Admission to the State's Law School.

The Washington Supreme Court announced that the law school's racial policies were on their face presumptively invalid but might be justified on a showing of a "compelling state interest." It then examined the evidence and proceeded to validate the racial quotas on what, at most, could be called a "rational means" test.

As we have already argued, there can be no "compelling state interest" for racial classification by the state except for its use to eliminate adverse racial classification theretofore imposed, or perhaps where the nation's security in time of war may be thought to justify such classification. See *Korematsu* v. *United*

States, 323 U. S. 214 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81 (1943). Assuming, however, that racial quotas can be justified by some other "compelling state interest," there is no such interest justified in this record.

The record in this case is devoid of support for the conclusion of "compelling state interest." Indeed, there was no conscious effort by respondents at trial to demonstrate any compelling state interest. Respondents' case rested primarily on "the cultural disadvantage" which the admissions committee wished to take into account in awarding places in the class. It was assumed, but not shown, that cultural disadvantage could be correlated with the four minority groups whose members were to be given preferential treatment. (St. 416; 73-74; 90; 108; 353; 400-01; 418-19; 424-25.) As one witness on compensatory pre-law training put it: "In formal terms, we articulate our concern for the economically and culturally disadvantaged. I suppose in practical terms our efforts have been largely with the minority group student . . ." (St. 125.) The equation between the "minority group students" and the culturally deprived can no more be made to justify racial classification than can the equation between minority groups and the economically deprived in the political sphere. *Compare Reitman* v. *Mulkey*, 387 U. S. 369 (1967), *with James* v. *Valtierra*, 402 U. S. 137 (1971).

When asked to explain the law school's race-based preferential treatment, respondents repeatedly claimed to be favoring applicants from deprived cultural and educational backgrounds. Those who offered this justification included the chairman of the school's admissions committee (St. 352; 402), the dean of the law school (St. 416-18; 424-25), the president of the University (St. 225; 243-44), and the former chairman of the board of trustees of the university (St. 108, 111). The evidence is, however, clear that defendants did not give preferential treatment to "deprived students" who were not blacks,

Chicanos, Indians, or Philippinos. (See, *e.g.*, St. 344; 352; 399.)

There is nothing in this record that shows that membership in one of the four minority races correlates with such deprivation. Indeed, a member of one of the favored minorities was to be treated as "culturally deprived" so far as the law school was concerned, even if he came from a highly intellectual and cultured family. Moreover, if a correlation could be made that showed every member of the four racial minorities to fall into the category of culturally and educationally deprived, the classification would still be invalid for underinclusiveness because it would fail to include culturally and economically deprived persons who are not members of these four racial minorities.

What the Constitution prohibits is that admissions be determined by race. Equal protection might not be offended by consideration of cultural deprivation; it is offended by considerations of race. If elimination of cultural deprivation were the compelling principle, however, it was not the guide used for special treatment for admissions to the law school here. The rule established for the University of Washington School of Law was simply that it was easier for a black, a Chicano, an American Indian, or a Philippino to enter than for a white or an Asian, without regard to the cultural deprivation from which the applicant may or may not have suffered. (St. 108-09; 225; 243-44; 261; 418; 423-24; 431.)

To support the so-called state interest in discrimination on the basis of race the Supreme Court of Washington relied only on three bits of evidence: (1) a self-serving declaration by the dean of the law school (St. 416); (2) the text of an impromptu speech given by the president of the University to a group of striking black students in 1968 during the time of the "university troubles" (Exh. 13); and (3) a "Survey of Black Law Student Enrollment" giving statistics for 125 law schools including the University of Washington School of Law for the

year 1970-71 (Exh. 7). These three items are patently inadequate to carry the "heavy burden" of showing a compelling state interest of the State of Washington in discriminating in favor of four racial groups in filling its law school classes.

In this case the State, thus, made only a token effort to shoulder the heavy burden of proving a compelling state interest in racial discrimination. Even if the minimal proof accepted by the Supreme Court of Washington could qualify under a rational means test, it cannot meet the compelling state interest test. The substitution of the lower quantum of proof is explicitly forbidden by a consistent line of cases in this Court dealing with racial classifications. *Slaughterhouse Cases,* 16 Wall. 36, 71 (1870: *Strauder* v. *West Virginia,* 100 U. S. 303, 307-08 (1880); Ex parte *Virginia,* 100 U. S. 339, 344-45 (1880); *Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944); *Oyama* v. *California,* 332 U. S. 633, 644-46 (1948); *Bolling* v. *Sharpe,* 347 U. S. 497, 499, (1954); *McLaughlin* v. *Florida,* 379 U. S. 184, 191-92 (1964); *Loving* v. *Virginia,* 388 U. S. 1, 10-11 (1967); *Hunter* v. *Erickson,* 393 U. S. 385, 392 (1969); *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971).

That the compelling state interest necessary to justify a racial quota has not been established here may be quickly seen from a glance at the decisions of this Court in recent years that have applied that standard. Although none of them involved so patent a violation of the Equal Protection Clause as a racial quota, in each case this Court has ruled that the interest of the state was not sufficient to override the prima facie violation of the Equal Protection Clause. *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Carrington* v. *Rash,* 380 U. S. 89 (1965); *Harper* v. *State Board of Elections,* 383 U. S. 663 (1966); *Williams* v. *Rhodes,* 393 U. S. 23 (1968); *Kraemer* v. *Union Free School District,* 395 U. S. 621 (1969); *Dunn* v. *Blumstein,* 405 U. S. 330 (1972). Indeed, as the Chief Justice pointed out in his dissent in *Dunn* v. *Blumstein,* "[No] state law has ever satisfied this

seemingly insurmountable standard." (405 U. S. 330, 363-64 (1972).)

The "compelling interest" standard has another attribute that was substantially ignored by the Washington Supreme Court and that dictates the reversal of that court's judgment. This Court stated in *Dunn* v. *Blumstein, supra,* 405 U. S. at 343: "[I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" There was in this case no substantial undertaking to discover the feasibility of means other than the utilization of a presumptively invalid racial quota for admission to the law school to accomplish the alleged state interests asserted here.

Obviously, as the compelling state interest cases already cited reveal, this Court is not the place to examine the alternatives that might permit the State to bring more of the culturally deprived members of racial minorities into the law school on an equal footing with other students. Affirmative action programs, not quotas are the requirements of national policy. (See our brief in support of the petition for certiorari in this case at pp. 19 *et seq.*) An "open admission" policy without racial standards might afford the answer. It might also be possible to open more places in law schools at the University of Washington or in other State university facilities where admission would not depend on the racial characteristics of the applicants. Special schooling might be afforded for preparation for admission to law schools for those who cannot meet the existent standards without such additional training, but again only so long as that schooling is not afforded on a racial basis. This case, however, involves no legitimate affirmative action, but a racial quota. As our brief in support of the petition for certiorari pointed out, so-called affirmative action programs that are not circumscribed in terms consistent with the Equal Protection Clause collapse into the very evil they seek to cure.

The social problem that the Washington Supreme Court purported to address cannot properly be considered one of quantity rather than quality. Even if it were legitimate to postulate, as that court did, that a lawyer or doctor should be trained to serve only persons of the same skin color or parental origins —a proposition that itself is inconsistent with the doctrine of equality underlying the Fourteenth Amendment—those doctors and lawyers should have the same appropriate skills and capacities as those practising their professions on behalf of others. The answer to the problem cannot be, as the Washington court would have it, a simple play on numbers. This we think should be evident from the fact that the alleged compelling state interest asserted by the Washington court here—providing training for black lawyers to serve black clients—would most easily and readily be met by creation of additional separate law schools for "minority" applicants who do not meet the standards for admission to existent law schools. No one doubts that the patent invalidity of such racial classification could not be overcome by the "compelling state interest" asserted here. Neither can the racial device actually used by the law school be justified by the "compelling state interest" found by the Washington Supreme Court.

The most charitable reading of the Washington Supreme Court's decision is that it has said that the alternative means for reaching its goal are more difficult, more time-consuming, more expensive. So long as the alternatives have the virtue of constitutionality, however, the Equal Protection Clause commands their use rather than the unconstitutional means that may be quicker, or less difficult, or less expensive. If the goals attributed to the state here are constitutionally valid, they cannot be accomplished by the unconstitutional means of that most invidious of discriminatory devices, the racial quota.

CONCLUSION.

The judgment below should be reversed because it condones the use of a patently unconstitutional means to an invalid end. A racial quota creates a status on the basis of factors that have to be irrelevant to any objectives of a democratic society, the factors of skin color or parental origin. A racial quota derogates the human dignity and individuality of all to whom it is applied. A racial quota is invidious in principle as well as in practice. Though it may be thought here to help "minority" students, it can as easily be turned against those same or other minorities. The history of the racial quota is a history of subjugation not beneficence.

The evil of the racial quota lies not in its name but in its effect. A quota by any other name is still a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant, politically, economically, and socially.

Respectfully submitted,

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APPENDIX.

This article appeared first in *The Chicago Tribune* for 29 June 1971 under the heading "Compassion, Minorities, and Subtle Racism." This photocopy is made from a republication in *The Kansas City Star*.

Disadvantaged a Bad Word

By Jean Beck

What are the most urgent needs of disadvantaged, minority group children?

To be free of the label of disadvantaged" — whether it's used with sentiment or compassion or as an excuse for subtle racism—and to be held to a single standard of high performance in school by effective teachers.

So says Dr. Kenneth B. Clark, psychologist and educator. Dr. Clark is president of the Metropolitan Applied Research Center in New York, professor of psychology at City College of New York and author of several books about the effect of racism on youngsters.

Calling lower-class, minority-group youngsters "disadvantaged" or "culturally deprived" and lowering academic expectations and school standards—even out of kindness and compassion—quickly becomes a self-fulfilling prophecy of massive educational underachievement, Dr. Clark emphasizes.

This compassion "is based

Too and Your Child

on characterizing or stereotyping whole groups of children as intellectually and academically inferior," notes Dr. Clark. Assuming they cannot achieve normally in school until economic, environmental, racial and political disadvantages have been removed simply becomes "an excuse or an explanation for the unwillingness or inability" to provide them effective education.

"On the surface these cultural, environmental and educational theories about disadvantage are seen as rejections of racism and as reflecting an understanding and compassion for the limitations of the culturally deprived child," acknowledges Dr. Clark.

"But under the guise of compassion and understanding, educational disadvantage is reinforced and under conditions encouraged," he says.

"The apparent compliance of these children by anticipating the limitations of their intellectual and academic capacity and modifying classroom and school policies and procedures has precisely the same effect as racial rejection."

Says Dr. Clark, "For blacks to be held to lower standards, different standards or in some cases no standards is a most contemptible form of racism.

"I do not know of a single situation in which minority-group children in a school or educational setting where compassionate acceptance and understanding translated into terms of lowered expectations, have led to any acceptable kind of performance on the part of these children," Dr. Clark declares.

Historically American public schools have shown that when "normal children are taught effectively without regard for the disadvantages of their parents, they have been able to use education as a means of overcoming economic disadvantage," Dr. Clark observes.

Only in the case of darker-skinned minority groups have educators argued that the schools were incapable of accomplishing this historic function.

The explanation for so many lower-class, minority group youngsters failing to meet the usual academic standards in school, according to Dr. Clark, is simply ineffective teaching.

"These children are not being taught adequately in the classroom," he maints. "They are not taken seriously as human beings, as indicated by being held to normal standards. They are not perceived as human beings who are capable of meeting standards. They are being treated—either malignantly or benevolently—as if they were unedeeable. They are being subjected to special programs designed to reinforce and verify the theses of unedeeability.

"One of the burdens of being a child of a minority group is that you have no way of protecting yourself from innovative programs," he comments.

What these youngsters need, [illegible] Dr. Clark, is for teachers to use "that most innovative of innovations in our lower-city schools—to teach."

He urges that teachers not be certified until they have completed three to five years in the classroom, teaching under close supervision. He says a strict system of teacher accountability is essential for effective teaching. And he wants teachers to be paid on a basis not of longevity but of "demonstrated professional effectiveness."

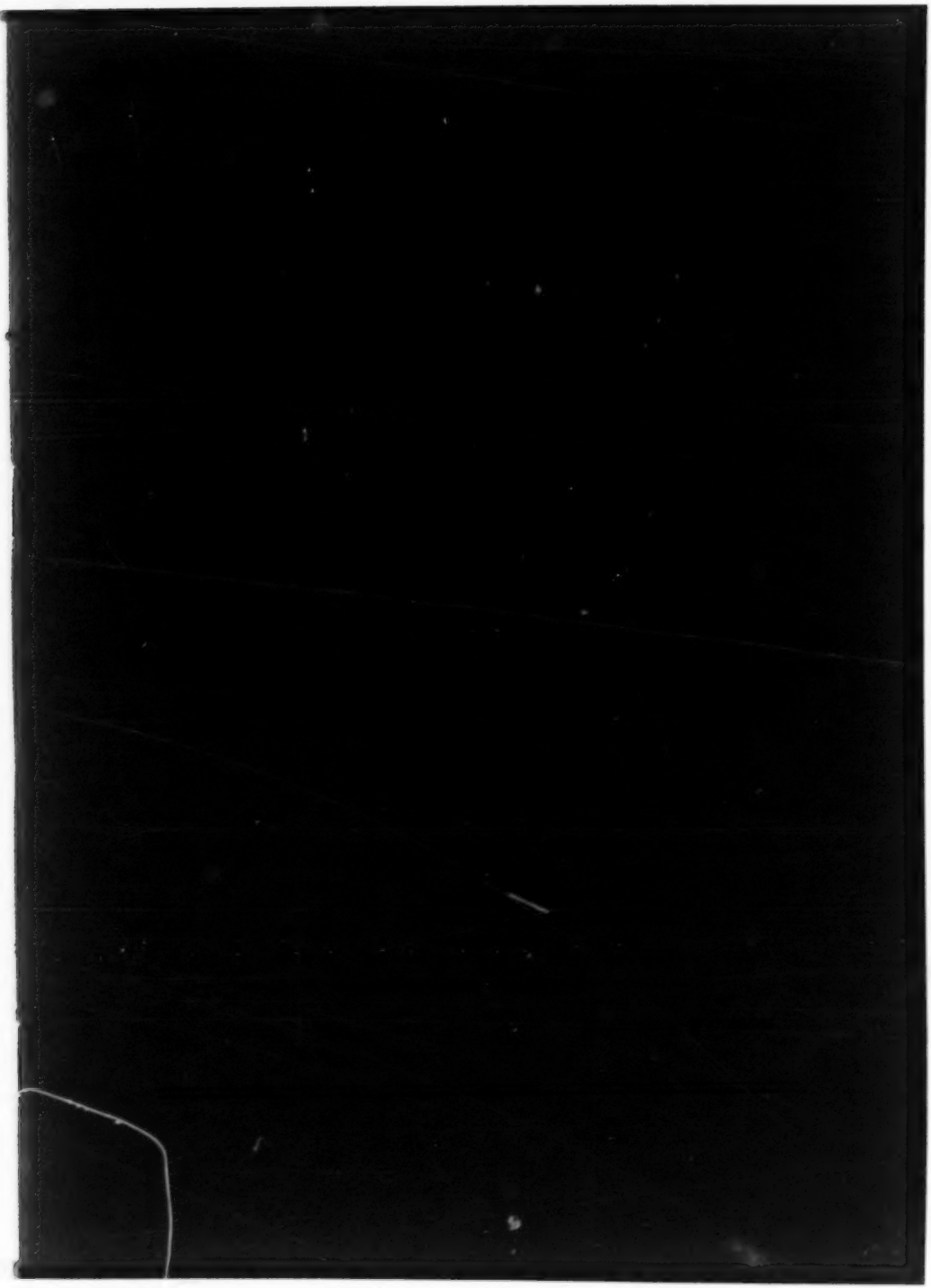
Dr. Clark advocates a "vigorous, tough-minded, hard-nosed educational program with a single standard of academic expectation and performance." Such standards would restore to minority youngsters the feelings of competence and self-esteem they cannot develop knowing less is expected of them than of others. And competitiveness would improve their morale and performance just as it does in athletics.

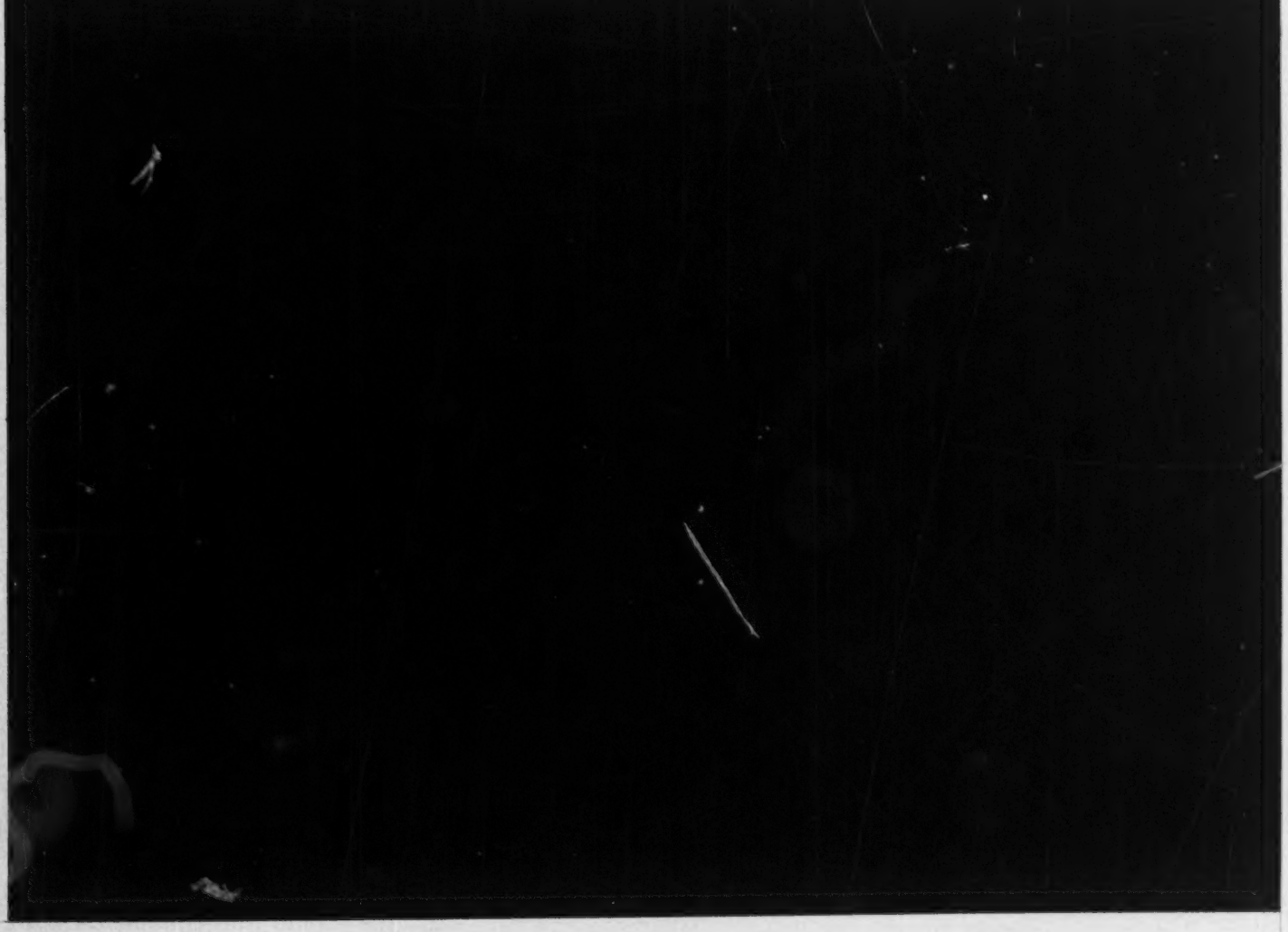
Emphasizes Dr. Clark, "I am opposed to multiple standards, to multiple entrance requirements, to multiple approaches to work for a degree." They imply, he notes, either that blacks are biologically inferior or that the sentimentalists' cultural deprivation theories are right and we will never be able "to deal with human beings without the irrelevance of color or race."

"I want these special programs and special considerations and special conditions and special dormitories and special remediations to be over tomorrow," he stresses.

"If the funds spent on these programs were used to strengthen a tough-minded educational system with a high degree of accountability, vigorous standards of curriculum and professional expectations, within a matter of two or three years, the results would be dramatically positive."

[illegible]





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In the Supreme Court of the United States

OCTOBER TERM, 1973

N. 73-235

MARCO DE FUNIS, ET AL., PETITIONERS

v.

CHARLES E. ODEGAARD, PRESIDENT, UNIVERSITY OF WASHINGTON, ET AL., RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR LEAVE TO FILE A MEMORANDUM AS AMICUS CURIAE

For the reasons set forth below, the Equal Employment Opportunity Commission respectfully requests the Court for leave to file the accompanying memorandum as *amicus curiae* in the above-styled case.

The Commission is the agency of the United States empowered by Congress with the administration and enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq., (Supp. II, 1972), which prohibits employment discrimination.

This case presents an issue which may have a sig-

nificant impact on the enforcement of rights under Title VII. In eliminating employment discrimination, the Commission and private parties have strongly relied on affirmative action remedies. The decision of the Washington Supreme Court, which in effect upholds the constitutionality of an affirmative action program in the area of education, may therefore have important ramifications on future affirmative action programs in the employment field.

In the employment field, affirmative action plans have been constitutionally tested and upheld in two contexts. In situations arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), courts have ordered remedial action for past discrimination. *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir.), *certiorari denied* 406 U.S. 950, *United States v. Wood, Wire, and Metal Lathers International Union, Local No. 46*, 471 F. 2d 408 (2d Cir.), *certiorari denied* 412 U.S. 939. Courts have also upheld federal affirmative action programs against challenges under the Equal Protection Clause or under the alleged anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j). *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002 (E.D. Pa.), *aff'd* 442 F. 2d 159 (3d Cir.), *certiorari denied* 404 U.S. 854, *Weiner v. Cuhahoga Community College District*, 19 Ohio St. 2d 35, 249 N.E. 2d 907, 908, *certiorari denied* 396 U.S. 1004. This Court's decision on the constitutional issue in this case may bear on the validity of these affirmative action plans and may well influence future actions in this field.

Therefore, we respectfully request this Court to accept this brief which expresses our views on the constitutional issues presented.

Respectfully submitted.

WILLIAM A. CAREY,
General Counsel.

JANUARY 28, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, ET AL., PETITIONERS

v.

CHARLES E. ODEGAARD, PRESIDENT, UNIVERSITY OF WASHINGTON, ET AL., RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

OPINION BELOW

The opinion of the Supreme Court of the State of Washington is reported at 82 Wash. 2d 11, 507 P. 2d 1169 (Pet. for Cert., App. A).

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on March 8, 1973. The petition for writ of certiorari was filed on July 31, 1973, and was granted on November 19, 1973. This Court's jurisdiction rests on 28 U.S.C. § 1257(3).

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QUESTION PRESENTED

Whether a state law school's minority admissions policy, under which a white student has been denied admission while blacks with lower numerical qualifications are accepted, violates the equal protection clause of the Fourteenth Amendment.

STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution (U.S. Const. amend. XIV, § 1) provides in pertinent part:

> . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The Petitioner, Marco DeFunis, Jr., (hereinafter referred to as Petitioner) applied for admission to the law school at the University of Washington for the class commencing September 1971. When he was denied admission, he commenced an action in the Superior Court of King County, Washington in August, 1971 alleging that the University of Washington (hereinafter referred to as Respondent) had wrongfully denied him admission in (1) that no preference was given to residents of the State of Washington in the admission process and (2) that persons were admitted to the law school with lower qualifications. The complaint asked that the court either order the Respondent to admit and enroll the Petitioner in the law school in the fall of 1971, or in the alternative, that the Petitioner recover damages of an amount not less than $50,000.

The Superior Court held that the failure to admit Petitioner constituted a denial of his right to equal protection of the laws under the Fourteenth Amendment, since pursuant to a minority admissions policy, minority students with lower numerical qualifications were admitted. The trial court ordered that Petitioner be admitted to the law school. On appeal, the Supreme Court of Washington overruled the trial court, holding that the minority admissions policy was based on a compelling state interest, and therefore, was constitutional.

SUMMARY OF ARGUMENT

The adoption of the minority admissions policy by the University of Washington was a valid exercise of the discretionary power granted educational institutions to make determinations pursuant to the public interest. Moreover, assuming arguendo that the petitioner has been discriminated by this policy, it can be justified as being reasonably related to a permissible state objective.

ARGUMENT

I

WHERE THE PURPOSE OF A STATE POLICY IS TO FURTHER A LEGITIMATE STATE OBJECTIVE, RATHER THAN TO STIGMATIZE A MINORITY GROUP, THE CLASSIFICATION IS SUBJECT TO THE RATIONAL BASIS TEST.

Any individual suffers a detriment when he is denied a position which another is granted.[1] This case

[1] Of those accepted, 74 had lower numerical qualifications than De Funis; only 36 of these were minority applicants, 22 were returning from military service and were granted veterans preference, and 16 were applicants accepted on the basis of information other than numerical qualifications.

concerns what factors a state university may consider in selecting students from a group all of whom are qualified for admission. Equal protection decisions recognize that a state cannot function without classifying its citizens for various purposes and treating some differently from others. *Truax v. Corrigan,* 257 U.S. 312. When any of these classifications are challenged under the equal protection clause, there are two standards against which a challenged classification may be measured. One test, employed when the classification is deemed suspect or the interest is considered fundamental, places the burden on the state to show that the practice is "necessary to the accomplishment of some permissible state objective, independent of the . . . discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving v. Virginia,* 388 U.S. 1, 11; *Korematsu* v. *United States,* 323 U.S. 214, 216. The other, less stringent test, is whether the classification is reasonably related to the object of the state policy and treats all persons alike who are similarly situated. *Royster Guano Co. v. Va.,* 253 U.S. 412, 415.

We contend that the proper standard of review here should be the rational basis test since the purpose of the state's policy is to further integration and not to stigmatize a minority.

The desegregation cases relied on by Petitioner, which applied the strict test, involved racial classifications which, throughout this country's history, have

been used to discriminate against a minority group which had been politically subordinate and subject to private prejudice and discrimination.[2] Racial classifications are usually perceived as a stigma of inferiority and a badge of opprobrium.[3]

Consequently, strict review is ordinarily required on the theory that race is a suspect classification, because that classification is likely to stigmatize. Such strict review is not appropriate when the classification is a means of benefiting a class which has previously been stigmatized. Therefore, strict review is inappropriate here where white applicants are not members of a class previously stigmatized.

Brown v. Board of Education, 347 U.S. 483, the primary case on which Petitioner supports his argument that the classification involved here is suspect, held that invidious *de jure* segregation on the basis of race violated the equal protection clause. Essential to the court's finding, however, were two elements—racial classification by law and harm to a minority

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[2] *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153 n. 4 "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Cf. *Hobson v. Hansen*, 269 F. Supp. 401, 507–08 & n. 198, (D.D.C.).

[3] Cf. Black, "The Lawfulness of the Segregation Decisions" 69 Yale L.J. 421, 424 (1960) [the social meaning of segregation is inequality, a stamping of one race with a mark of inferiority].

race. The constitutionality of benevolent discrimination was not before the court and not meaningfully illumined by it. The major premise on which *Brown* rests is that classifications by race which stigmatize a race with inferiority are unconstitutional.

Where the state's purpose and the effect of its action are not invidiously discriminatory and the group normally subject to discrimination is being benefited, the standard is different. Voluntary measures to end *de facto* school segregation have been upheld consistently by both federal and state courts, even though racial classifications are involved.[4] The language in some of these cases indicates that only a test of reasonableness has been applied. For example in *Tometz v. Board of Education,* 39 Ill. 2d 293, 237 N.E. 2d 498, the Illinois Supreme Court upheld state legislation which required local school boards to take steps to end de facto segregation. The court held that the applicable test was "one of reasonableness", and the court could not "say that the legislature acted arbitrarily and without a reasonable basis in so directing the school boards of this State." 237 N.E. 2d at 502.

This Court's decision in *Katzenbach v. Morgan,* 384 U.S. 641 also suggests that normally suspect classifica-

[4] *Offerman v. Nitkowski,* 378 F. 2d 22 (2nd Cir.); *Tometz v. Board of Educ.,* 39 Ill. 2d 593, 237 N.E. 2d 498; *School Comm. v. Board of Educ.,* 352 Mass. 693, 227 N.E. 2d 729; *appeal dismissed,* 389 U.S. 572; *Booker v. Board of Educ.,* 45 N.J. 161, 212 A. 2d 1; *Balaban v. Rubin,* 14 NY 2d 193, 199 N.E. 2d 375, *certiorari denied,* 379 U.S. 881.

tions may be judged by a rational basis standard of review. The Court upheld section 4(e) of the Voting Rights Act of 1965, 42 USC § 1973 b(e) (Supp. III, 1968) even though the statute creates a distinction based on national origin. The decision to apply the permissive standard was based on the dual judgment that the measure extended benefits to a particular class and that the legislative purpose in doing so was remedial.

This Court recognized, in *McDaniel v. Barresi*, 402 U.S. 39, 41 that a school which voluntarily adopts a desegregation plan may take into account the race of the students. As stated therein, ". . . to have done otherwise would have severely hampered the [school] board's ability to deal effectively with the task at hand. . . . In this remedial process, steps will almost invariably require that students be assigned differently because of their race. Any other approach would freeze the status quo that is the very target of all desegregation processes." 402 U.S. at 41.

To require that all attempts to integrate a school be free of racial classification where there exist effects of past racial discrimination would defeat the very purpose of integration. In order to eliminate those effects, a plan cannot be "color blind" as urged by Petitioner. That requirement would render illusory the promise of *Brown v. Board of Education*, 347 U.S. *supra*.

The interest being advanced by the Respondents here is the integration of the law school and the legal

profession. Integration and increased enrollment of blacks in predominantly white schools has been the announced policy of this Court. *Brown v. Board of Education*, 347 U.S. *supra*, *Green v. County School Board*, 391 U.S. 430, 439. Specifically, this Court has been committed to the integration of state law schools in order to achieve quality education and legal representation for minorities since *Sweatt v. Painter*, 339 U.S. 629. In order to achieve this goal, educational institutions have an affirmative duty to eliminate the present effects of past discrimination. *Swann v. Board of Education*, 402 U.S. 1, 26; *U.S. v. Jefferson County Board of Education*, 380 S. 2d 385 (5th Cir. *certiorari denied, sub nom Caddo Parish School Board v. U.S.*, 389 U.S. 840).[8]

Because of past and continuing racial discrimination, race is the only realistic criterion that would satisfactorily correlate with the Respondent's goal of a racially integrated law school. The court below recognized that the consideration of numerical qualifications alone would disproportionately prevent minorities from attending law school. Consequently, the relation between public interest being served, i.e. integration, and the classification utilized by the Respondent is obvious, and the consideration of race in the present context is not an invidious or suspect classification.

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[8] In several analogous cases in the employment field, the validity of hiring practices, which have a racially discriminatory effect, has been challenged under the equal protection clause. However, rather than applying the compelling state interest standard to the racial classification, the courts emphasized the benevolent nature of the classification and adopted the less stringent standard. *Carter v. Gallagher*, 452 F. 2d 314 (8th Cir.); *Castro v. Beecher*, 459 F. 2d 725 (1st Cir.) *Cf. Griggs v. Duke Power*, 401 U.S. 424.

ARGUMENT

II

SINCE THE MINORITY ADMISSIONS POLICY IS REASONABLY RELATED TO A LEGITIMATE STATE INTEREST, IT IS CONSTITUTIONALLY PERMISSIBLE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The rational basis test is peculiarly applicable in the present case since regulation of educational institutions is a matter peculiarly affected with public interest. The state legislature (and by delegation the governing body of the university) may properly regulate the conditions by which students may be admitted to a university maintained by the state. *Waugh v. Miss. Univ.* 237 U.S. 589. In cases challenging the constitutionality of admissions classifications under the equal protection clause of the Fourteenth Amendment, Courts have held that any "classification by a state which is not palpably arbitrary and is reasonably based on a substantial difference or distinction is not a violation of the equal protection clause so long as the classification is rationally related to a legitimate state object or purpose". *Clark v. Redeker,* 25 F. Supp. 117, 122 (S.D. Iowa) *affirmed* 406 F. 2d 883 (8th Cir.) *certiorari denied* 396 U.S. 862.

This standard for determining constitutionality requires the court to determine the purpose of the admissions policy being challenged and consider that particular purpose in light of the state interests involved. After the purpose has been ascertained, the policy will be set aside as violative of the equal protection clause only if it is based on reasons totally

unrelated to a legitimate goal. *McLaughlin* v. *Florida* 379 U.S. 184, 191. *McDonald* v. *Board of Election Commissioners,* 394 U.S. 802. Under this test, the party challenging the constitutionality of the policy has the burden of proving that the statute is not reasonably related to some permissible legislative or administrative purpose. *McGowan v. Maryland,* 309 U.S. 83, 88; *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61.

Admissions decisions have never derived from simple mathematical projections about the academic or intellectual ability of applicants. A variety of other criteria have always received consideration and the weight given these criteria has varied considerably among individual applicants.

For example, at many state universities geography is often the basis for preferential admissions. Several courts have held that special considerations given to state residents are within the state's discretionary power, e.g. *American Commuters Ass'n v. Levitt,* 405 F. 2d 1148 (2d Cir.); *Arizona Board of Regents v. Harper,* 108 Ariz. 223, 495 P. 2d 453. This consideration has been upheld in numerous cases which have challenged the constitutionality of higher nonresident

tuition. The courts held that the additional tuition charge to nonresident students was reasonably related to a legitimate state purpose and did not constitute an unreasonable and arbitrary classification violative of the equal protection clause. *Clarke v. Redeker*, 259 F. Supp. at 123 *supra; Johns v. Redeker*, 406 F. 2d 878 (8th Cir.); *Bryan v. Regents of Univ. of California*, 188 Cal. 559, 205 P. 1071; *Land Wehr v. Regents of Univ. of Colorado*, 156 Col. 1, 396 P. 2d 451; *Starns v. Walkerson*, 326 F. Supp. 234 (D. Minn.) *affirmed*, 401 U.S. 985; In accord: *Spatt v. State of New York*, 361 F. Supp. 1048, 1054 (E.D. N.Y.); *Kirk v. Bd of Regents*, 733 Cal. App. 2d 430, 78 Cal. Rptr. *appeal dismissed* 396 U.S. 554.

The reasoning applied in the cases above was also adopted in employment cases challenging the constitutionality of the veterans' preference in state and federal civil service examinations. *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa.); *Koelfgen v. Jackson*, 355 F. Supp 243 (D. Minn. *affirmed* 410 U.S. 976. Plaintiffs, alleging sex discrimination in violation of the equal protection clause, argued that the preference given veterans could not be justified by a compelling state interest and was therefore unconsti-

tutional. However, both courts applied the "rational basis" test, and found the preference reasonably related to a permissible administrative purpose.* Furthermore, the court in *Feinerman*, 356 F. Supp at 261, *supra*, stated that great latitude should be allowed legislatnres in making classifications if the policy being followed is designed to help a class which needs assistance.

The preferenee given minorities in the instant ease is not unlike that given state residents and veterans in the eases eited above. Under delegated authority from the state the law school indeed had the right, and (perhaps some would say) the duty, to make classifications among applicants for admission, which are within the public interest of the state and the law school. In fact, this court has looked at the conduct of admissions committees in such a way as to say that universities do have power to remedy past effects of present discrimination by preferential admissions policies.

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*The courts of several states have ruled on the general question of the constitutionality of veterans' preference and without exception have all ruled it to be constitutional: *Ricks v. Department of State Civil Service*, 200 La. 241, 8 So. 2d 49; *Swantush v. Detroit*, 257 Mich. 389, 241 N.W. 265; *Commonwealth ex rel. Graham v. Schmid*, 333 Pa. 566, 3 A. 2d 701. Additionally, the veterans' preference given in federal civil service examinations has been held constitutional. *White v. Gates*, 253 F. 2d 868, *certiorari denied*, 356 U.S. 973.

The law school here has determined that there had been exclusion of certain minorities from the legal profession, and that inclusion of these minorities would benefit the general public. Therefore, the school established an admissions policy designed to increase the minority student enrollment. This policy would deny the petitioner equal protection of the laws only if "it is without any reasonable basis, and therefore is purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. at 78 *supra*, *Dandridge v. Williams*, 397 U.S. 471, 485. Clearly it is not.

CONCLUSION

For the reasons stated above, the judgment below should be affirmed.

Respectfully submitted.

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I hereby certify that on January 21, 1974, three copies of the foregoing Motion of the Equal Employment Opportunity Commission for Leave to File a Memorandum as Amicus Curiae and accompany Memorandum were mailed, postage prepaid and special delivery, to the following counsel of record:

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U.S. GOVERNMENT PRINTING OFFICE: 1974

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SUPREME COURT, U. S

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, et al.,
PETITIONERS,

v.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, et al.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY IN SUPPORT OF THE RESPONDENTS

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BRIEF AMICUS CURIAE OF THE CENTER FOR LAW AND EDUCATION, HARVARD UNIVERSITY IN SUPPORT OF THE RESPONDENTS

Introduction

We present this brief in support of the respondents with the consent of all parties pursuant to Supreme Court

Rule 42(1). Copies of the letters of consent are attached to our covering letter to the Clerk of this Court. We rely on respondents' treatment of the questions presented for review, constitutional and statutory provisions involved and statement of the case. The findings of fact and conclusions of law, oral decision and judgment of the Washington Superior Court for King County are found in Petitioners' Appendix pp. 55-60. The opinion of the Supreme Court of Washington reversing the Superior Court decision is reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

Interest of Amicus Curiae

The Center for Law and Education, Harvard University, was created jointly by the Harvard Law School and the Harvard Graduate School of Education in 1969. The Center is funded by the United States Office of Economic Opportunity to work in conjunction with local legal service offices and other attorneys to promote reform in American education by working in the area of social policy and the law, especially on behalf of the poor. The Center's attorneys have concentrated on problems in the following areas: racial discrimination; federal programs, resource allocation, within and between school districts; bilingual education; "ability grouping"; and excluded children. Center personnel have participated in litigation, including the preparation of several *amicus* briefs; done research and writing; drafted legislation; and negotiated with public officials. The Center publishes a bulletin entitled *Inequality in Education*. Recent *amicus* briefs filed by the Center in this Court include those in *Johnson* v. *New York State Education Department*, 93 S.Ct. 259 (1972) and *Lau* v. *Nichols*, No. 72-6520, October Term 1973. The Center's affiliation with the Harvard Graduate School of Education facilitates our presenting to courts educational data which

is material under governing legal principles. The filing of this brief permits the Center to present an argument on a matter substantially affecting the range and quality of educational opportunities afforded minority group students in this country.

Argument

I. Should the Court Decide To Reach This Case on the Merits It Should Affirm the Judgment of the Supreme Court of Washington.

The thrust of this brief is that this Court ought not resolve in this case the delicate and important issues which are posed by the parties and *amici*. Our reasons for urging this course are spelled out in Part II, *infra*. However, should the Court feel that the posture of the case is one calling for a decision on the merits, we believe that the judgment of the court below should be affirmed.

A. *The Equal Protection Clause of the Fourteenth Amendment Does Not Condemn as "Suspect" Classifications Aimed at Bringing Racial Minorities into the Mainstream of American Life.*

The Thirteenth, Fourteenth and Fifteenth Amendments ratified as a national purpose the elimination of disabilities borne by black people at the hands of the white majority.[1] Emanating from and consistent with this purpose the University of Washington Law School has adopted an admissions procedure the goal of which is to increase the number of qualified black and minority applicants who are admitted to its ranks. The essence of this procedure

[1] See *Slaughterhouse Cases*, 83 U.S. 36 (1872); *Ex parte Virginia*, 100 U.S. 339 (1879); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

is that the Law School places somewhat less heavy reliance on certain tests when judging applications from minority students and somewhat greater reliance on factors of individual motivation and potential contribution to the law school and the profession. Petitioner reasons, however, that a program which admits more minority race students must necessarily limit the number of majority students admitted. Hence, he concludes that he is the subject of "suspect" classification because of his race.

This Court has only recently reminded us that under the Equal Protection Clause a "suspect" classification must bear the traditional indicia of suspectness, that it be "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 93 S.Ct. 1278, 1294 (1973). Thus in basing his attack on the University's affirmative action program largely on citation of language in cases condemning racial classifications which burden minority groups "(r)ather than focusing on the unique features of the alleged discrimination (the petitioner has) virtually assumed . . . findings of a suspect classification through a simplistic process of analysis . . ." *supra* at 1289.

Moreover as Mr. Justice Stewart has pointed out, suspect criteria are determined by their "purpose or effect" *supra* at 1311. Thus if petitioner's analysis were to be adopted by this court any program designed to eliminate the historic burden of discrimination against racial minorities would be subject to constitutional infirmity. Such a result would not only mark an end to our efforts toward racial equality but would frustrate the purpose of the Fourteenth Amendment in a way not heretofore sanctioned by decisions of this Court.

B. *The State's Interest in Training Minority Members of the Legal Profession Is the Kind of Interest Which American Education Has Always Sought To Advance.*

The State's desire to increase minority enrollment at the law school and in the legal profession proceeds from a philosophical perspective with which the petitioner clearly disagrees. Petitioner's Opening Brief, pp. 17-21. Thus petitioner would apparently prefer a system whereby law school admissions come as a reward to those applicants who score highly on certain tests. However, despite petitioner's disagreement with the State's purpose in adopting a flexible admissions policy, the state in doing so is well within the bounds of the traditional purposes of public education in this country.

Public education has always been grounded in the needs of the body politic and not in rewarding particular students for certain kinds of academic performance. Benjamin Rush, one of the signers of the Declaration of Independence, wrote that, "It is only by rendering knowledge universal, that a republican form of government can be preserved in our country."[2] This general proposition is amplified in the writings of others at the time. Realizing that the new government could not operate without social cohesiveness and understanding of the laws, Noah Webster wrote that: "Here every class of people should know and love the laws. This knowledge should be diffused by means of schools and newspapers; that an attachment to the laws may be formed by early impressions on the mind . . ."[3] And stressing the point that all classes of citizens needed this experience others wrote that: "Education should not

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[2] Rush quoted in *Hansen, Liberalism and American Education* (New York, 1926) at p. 53.

[3] *Ibid.*, 73.

be left to the caprice, or negligence of parents, to chance, or confined to the children of wealthy parents."[4]

In this case the respondents have determined that the public purpose is served by increasing the number of lawyers in the minority community. To this end it has employed a flexible admissions policy in the hope of finding qualified minority students. Whatever else may be said of the state's determination in this regard it cannot seriously be argued that such a purpose is irrational or unreasonable in the light of the purposes which have always underlain American public education.[5]

II. This Court Ought Not Decide Important Constitutional Issues in a Case Which Lacks an Adequate Record and Is Very Likely Moot.

The parties to this case and supporting *amici* have asked this Court to decide the emotional and difficult issues involved in the currently raging public debate over "affirmative action" and "quotas." Inevitably the Court will have to reach the constitutional implications of this debate. However the record and posture in this particular case present prime examples of the principle that this Court should avoid premature adjudication of constitutional issues. *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972); *Rescue Army* v. *Municipal Court of City of Los Angeles*, 331 U.S. 549 (1947). We urge this course even though "it would be convenient for the parties and the public to have promptly decided..." the issues in this

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[4] *Ibid.*, 71.

[5] For judicial recognition of the underlying public purpose of education, see, e.g., *Ferrell* v. *Dallas Independent School District*, 261 F. Supp. 545 (N.D. Tex., 1966), *cert. denied* 393 U.S. 856 (1968): "One of the most important aims of the school should be to educate the individual to live successfully with other people in our democracy... (s)ociety expects public education to concern itself with building young citizens as well as teaching the '3R's'." at 552.

case. *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345-6 (1936) (concurring opinion of Brandies, J.).

A. *The Record Is Inadequate in at Least Two Crucial Respects.*

First, petitioner has claimed that he was denied admission to the University of Washington Law School because "less qualified" minority students were admitted in his place. However the record shows that because of petitioner's ranking on the school's waiting list (St. 379) he would not have been admitted to the law school even if there had been no minority recruitment program (St. 453-455). Thus, even though some other majority student might be in a position to challenge the minority recruitment program petitioner who has failed to show that *he* is injured by the program may not do so. *Ashwander* v. *Tennessee Valley Authority, supra* at 347.

Second, important factual data relevant to the reasonableness of the state's actions in instituting the minority program is not developed in the record. And while we make no attempt here to fully develop that data some indication of what is missing is in order.

(1) In the case of *Gaston County, North Carolina* v. *United States*, 395 U.S. 285 (1969) this Court recognized that the imposition of a literacy test on Negro citizens who had been subject to past school segregation "would serve only to perpetuate these inequalities in a different form." at 297. Application of the *Gaston County* case to the instant litigation might well justify even more markedly different admissions criteria for black applicants if, for instance, many of Washington's black citizens had received education in states which had practiced school

segregation.[6] In fact such is very likely the case. According to 1970 Census figures some 42% of the black population of the State of Washington was born in the South.[7] Further reference to the public school records of Washington school children could have determined precisely in which school districts these Southern born black children had attended school before migrating to Washington. In any event the Southern black children who migrated to Washington clearly bore the scars of their past. According to one official report of the Washington State Census Bureau school teachers and principals in the City of Seattle uniformly referred to the adjustment problems of Negro school children who had migrated from the South. Schmid and Miller, *Population Trends and Educational Change in the State of Washington,* Washington State Census Board at 119 (1960). Thus it can be argued that a very large percentage of the potential black applicants to the University of Washington suffered the disabilities of past *de jure* segregation and that in adopting its affirmative action program the state was simply recognizing that the effects of "discrimination on account of color and racial origin is not confined to the South..." *Oregon* v. *Mitchell,* 400 U.S. 112, 134 (1970). See also the separate opinion of Mr. Justice Brennan, Mr. Justice White and Mr. Justice

[6] Testifying in favor of extension of the literacy test ban of the Voting Rights Act of 1965 to non-Southern states the Attorney General of the United States pointed to the effect of literacy tests on migrating Southern blacks. In reference to the *Gaston County* decision he said: "Thus, following the Supreme Court's reasoning, it would appear inequitable for a State to administer a literacy test to such a person because he would still be under the educational disadvantage offered in a State which had legal segregation." Hearings on Extension of the Voting Rights Act Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 1st Sess., ser. 3 (1969).

[7] U.S. Bureau of the Census, *State of Birth Subject Reports,* PC (2)-2(A), Table 27 and 28 (March, 1973). Of 69,975 black Washington residents in 1970, 29,388 were born in the South.

Marshall recognizing related implications of interstate migration, *supra* at 235-236.

(2) Not only does the record fail to show the origins of Washington's black population, it also lacks adequate reference to the fact of racial discrimination and isolation which greeted the newly arrived black migrants. A review of the cases shows that Washington's black population has been faced with widespread housing discrimination,[8] discrimination in public accommodations,[9] employment discrimination[10] and white resistance to school integration.[11] The resulting patterns of racial isolation and deprivation can also be shown through available statistics. A 1967 report of the United States Civil Rights Commission revealed that 60% of Negro elementary students in Seattle attended majority black schools even though Negro students accounted for only 10% of the elementary school population.[12] Other figures show that while only 2% of the white adult population of Washington had less than 5 years of elementary education, nearly 7% of the black and 16% of the Spanish speaking population had such little schooling.[13] It is not surprising then that mean family income for whites was more than $2,000 greater

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[8] *O'Meara* v. *Washington State Board Against Discrimination*, 58 Wn.2d 793, 365 P.2d 1 (1961).

[9] *In re Johnson*, 71 Wash. 2d 245, 427 P.2d 968 (1967) (barber shops); *Price* v. *Evergreen Cemetery Company of Seattle*, 57 Wash. 2d 352, 357 P.2d 702 (1960); *Browning* v. *Slenderella Systems*, 54 Wash. 2d 440, 341 P.2d 859 (1959).

[10] *Arnett* v. *Seattle General Hospital*, 65 Wash. 2d 22, 395 P.2d 503 (1964); *United States* v. *Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971); *cert. denied* 404 U.S. 984 (1971).

[11] *Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P.2d 536 (1972); *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 495 P.2d 657 (1972).

[12] U.S. Commission on Civil Rights, 2 *Racial Isolation In The Public Schools*, App. A.1 (1967).

[13] U.S. Department of Commerce, *1970 Census of Population*, Volume 1, Part 49, Table 51 (1973).

than for blacks,[14] or that more than twice as many black families as white families had incomes under the poverty level.[15] And the latter disparity is even sharper for black youth under 25, some 25% of whom live at the poverty level compared with only 9% of their white counterparts.[16] Finally, and of special relevance to the facts in this case, there are but 15 black lawyers or judges in the State of Washington. White members of the legal profession and judiciary total nearly 4,000, more than five times greater than the white to black population ratio.[17]

(3) The foregoing statistical tale of inequality is indicative of the kind of information the record lacks, information making manifest the reasonableness of the affirmative action policy under attack in this case. Perhaps such evidence was not available at the time the case was tried. We do not know. We do know, however, that the respondents' repeated assertion that the University of Washington has never been guilty of racial discrimination in its history overlooks at least one widely reported recent incident. In 1971 the University's Human Rights body issued a report essentially corroborating charges by black students of a pattern of racially discriminatory conduct in the undergraduate athletic program.[18] This too was omitted from the record.

Thus with regard to the particular petitioner in this case the record is not sufficiently clear as to the precise harm he has suffered to allow for a decision on his constitutional claims. *Smith* v. *State of Mississippi*, 373 U.S. 238 (1963); *Commonwealth of Massachusetts* v. *Painten*, 389 U.S. 560 (1968). And as regards the broad constitutional questions presented by both sides, the record

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[14] *Ibid.*, Table 57.
[15] *Ibid.*, Table 58.
[16] *Ibid.*, Table 207.
[17] *Ibid.*, Table 171.
[18] New York Times, January 23, 1971, p. 21.

does not adequately present the questions tendered. *Needleman* v. *United States*, 362 U.S. 600 (1960). Rather than "risk inconclusive and divisive disposition of a case when time may further illumine . . . the issues in dispute," *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77 (1955) this Court should refrain from a decision on the merits and dismiss the writ of certiorari as improvidently granted.

B. *This Case Is Moot. A Decision by This Court Will Have No Practical Effect on De Funis' Law School Career.*

In their Memorandum on the Question of Mootness the respondents make the following observation: "Counsel is further advised by the Dean of the law school . . . that if Mr. De Funis registers for the spring quarter . . . during the registration period from February 20, 1974 . . . that registration would not be canceled unilaterally by the university *regardless of the outcome of this litigation.*" (emphasis added). In other words a decision in this case announced after February 20, 1974 would have no effect whatsoever on petitioner's finishing his course of legal study. Petitioner has failed to show that he needs a constitutional decision from this Court to vindicate any currently claimed deprivation.[19]

A year ago when the state court reviewed the mootness issue it concluded that the case was not moot, largely because of the public interest in the ultimate issues involved in this litigation. That conclusion is, of course, not binding on this Court. *Liner* v. *Jafco, Inc.*, 375 U.S. 301,

[19] Petitioner has not alleged, for instance, that he will not be allowed to take bar examinations or be considered for membership in professional organizations.

304 (1964). In any event the intervening year has rendered even more unnecessary petitioner's desire for a constitutional decision. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

The respondents argue, however, that the case should be reached under the exception to the mootness doctrine for cases "capable of repetition, yet evading review." *Roe* v. *Wade*, 410 U.S. 113 (1973). One need not exhaust the imagination to think of class action, declaratory judgment or other vehicles whereby these issues may reach this Court in a case which is not moot. In any event, far from being the kind of case which "evades review" the great public concern over the issues of affirmative action v. quotas makes highly likely this Court's review of the subject. And that being so, the Court ought not reach these issues in a case of first impression which lacks a petitioner with interests actually turning upon a decision by this Court.

Conclusion

One additional but perhaps fundamental reason counsels against this Court reaching the issues presented by the parties and *amici*. For if petitioner is successful the academic fate of minority law students will be placed in jeopardy not only at the University of Washington but also at law schools throughout the country. We intend no implication that the University is less than wholly committed to its current affirmative action program. Yet it is undeniable that present and future black and brown law students have the most to lose should this petitioner (who will gain nothing) prevail. That being the case it would seem of paramount importance that this Court have the benefit of an adequately developed record when it ultimately decides these questions. Thus we respectfully urge this Court to dismiss the case as moot or in the

alternative dismiss the writ as improvidently granted for the reason that the record does not adequately present the constitutional issues in the case.

Respectfully submitted,

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SUPREME COURT, U. S.
FILED
JAN 31 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, *et al.*

Writ of Certiorari to The Supreme Court of the State of Washington

BRIEF FOR THE BOARD OF GOVERNORS OF RUTGERS THE STATE UNIVERSITY OF NEW JERSEY AND THE STUDENT BAR ASSOCIATION OF RUTGERS SCHOOL OF LAW AT NEWARK AS *AMICI CURIAE*

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IN THE

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OCTOBER TERM, 1973

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MARCO DEFUNIS, *et al.*,

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Writ of Certiorari to The Supreme Court of the State of Washington

BRIEF FOR THE BOARD OF GOVERNORS OF RUTGERS THE STATE UNIVERSITY OF NEW JERSEY AND THE STUDENT BAR ASSOCIATION OF RUTGERS SCHOOL OF LAW AT NEWARK AS *AMICI CURIAE*

This brief *Amicus,* in support of the position of the Respondents, is filed by the Board of Governors of Rutgers, the State University of New Jersey, and the Student Bar Association of Rutgers School of Law at Newark, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

Interest of *Amici*

The *Board of Governors* of Rutgers, The State University of New Jersey, governs the entire university system, with its many campuses and some 40,000 graduate and undergraduate students. For the past half dozen years, at least, Rutgers University has been keenly aware of an obligation to better serve the non-white[1] population of New Jersey—particularly the state's large black and Puerto Rican populations—by bringing more of its members into its student bodies to train for the business and professions and communal life in general.

Among the spurs to affirmative action by the University was the Report issued in 1968 by the New Jersey Governor's Select Commission on Civil Disorders[2] following the disturbances which swept the state's urban population centers in the summer of 1967. Examining the status of racial minorities in New Jersey, this most distinguished body, which included two former Governors of the State and a future federal appeals judge among its ten members, emphasized:

> The central issue with which this nation has temporized for the past one hundred years—to make equality real for the black man—was bound sooner or later to land on the doorsteps of each of us.[3]

---

[1] The term non-white will be used throughout this brief to refer to those racial minorities which traditionally have been the targets of racial discrimination in this country. This includes not only the black population but the large Puerto Rican and Cuban populations centered on the East Coast, Chicanos in the West and American Indians concentrated in various parts of the country.

[2] Hereafter referred to as Report for Action.

[3] Id. at XI.

And in a pointed mandate to all agencies of official power in the State of New Jersey, the Commission declared:

> The burden of responsibility weighs most heavily on those in positions of power and with control over the resources that will be needed to produce tangible results.[4]

Responding to this call for action, the Rutgers Board of Governors passed a Resolution on March 14, 1969, to "establish a new and pioneering program" to "open college doors to educationally and economically disadvantaged graduates" of secondary schools in the three major urban centers of New Jersey with heavy concentrations of racial minorities—Newark, Camden and New Brunswick.

The University's Law School at Newark had recognized, even earlier, a particularly compelling need to increase the pitifully small number of indigenous lawyers available both to service the legal needs of the nonwhite population of the state[5] and to represent the nonwhite population within the legal/political system, which tends to be dominated by members of the legal profession. This recognition of the law school's obligation was prodded, among other things, by Mr. Justice Brennan's remarks at the dedication of the Law School building in the fall of 1966:

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[4] Ibid.

[5] This is not to suggest that the Law School has limited admission to its Minority Student Program to residents of New Jersey. As a national law school, Rutgers has, in all ways, served a constituency which is, in significant part, regional and even nationwide.

> [T]he law schools have experienced almost no success in attracting Negro college students to law as a career. * * *
>
> And I am sure all of us will agree that, as [has been] said, "There are reasons why a special effort should be made to attract Negro students to law study. In the effort to provide equal rights and opportunities for Negro citizens, there are heavy responsibilities and burdens for lawyers to carry. These can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community. In bringing legal counsel to the poor, in administering criminal justice, as well as in the struggle for civil rights, an increased number of Negro lawyers can make a great contribution."[8]

Responding, in part, to these remarks, the Law School established a special faculty committee to develop a program for increasing non-white enrollment. In the Spring of 1968, the faculty voted overwhelmingly to institute a Minority Student Program, with the goal of admitting at least 20 qualified non-white students the following September and as many as 40 per year in succeeding years. The program was described as follows in the Law School Bulletin for 1969-70:

> Rutgers Law School in Newark recognizes a special responsibility to prepare minority group students for the practice of law. In common with the

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[8] 89 N. J. L. J. 801, 807-08 (1966).

rest of the country, the legal system in New Jersey is filled largely with white persons. To assure and build confidence in our legal institutions, it is imperative that blacks enter the legal profession . . . .

• • •

During the last decade, the Rutgers Law School has addressed itself to this problem, cautiously at first, and then, in the spring of 1968 in an extensive way. Facing squarely the fact that reliance by law schools on traditional admissions criteria had had the effect of nearly excluding Negroes from legal education, the faculty of the law school decided to take 20 Negro students as freshmen in the law school, emphasizing age, business experience, leadership potential and personal recommendations. These were carefully considered and evaluated with the Law School Admission Test score and the undergraduate record in constructing the class for the program.

• • •

The program, in operation, has concentrated on making available to the students a combination of increased financial assistance and personal and academic counseling. . . .[7]

Rutgers University and its Board of Governors thus have great interest in and concern about the outcome of this case since it will seriously affect the future of the Rutgers Law School Minority Student Program and the University's ability to serve the educational needs of the state's non-white populations.

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[7] Rutgers University, the State University of New Jersey, School of Law—Newark, Announcement 1969-70, p. 27.

The Student Bar Association (SBA) is the duly elected student government for the Rutgers Law School in Newark. As such it represents a constituency which is about 80 per cent white and some 20 per cent black and Hispanic. The SBA wholeheartedly supports the efforts of the Law School to better serve the non-white populations, and is proud of the Law School's success in dramatically increasing the number of non-white students and graduates in the past few years. The SBA further believes that the entire law school, including its majority white population, have greatly benefited from the increase in minority enrollment and the resulting expansion of "the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt* v. *Painter*, 339 U. S. 629, 634 (1950).

It is absolutely clear from enrollment statistics and applicant credentials that if the law school did not set aside a significant number of spaces for non-white students under the Minority Student Program and if it were compelled to revert to a system of admissions based solely on paper records, the Law School would once again become an almost exclusively white institution, as it was less than 10 years ago.

The student body which the SBA represents thus has both a civic and a personal interest in seeing that the Minority Student Program is not jeopardized by judicial decision.

Statement

It is surely one of the great ironies of American constitutional history that after 350 years of legally enforced and/or sanctioned oppression of black people, the belated

recognition of the right of non-whites to equality before the law is now urged as a bar to the achievement of that very equality.

Yet this case presents just such an anomaly. The Respondent is one of 150 or so law schools in this country which, over a period of many years, either by design or indirection, devised and enforced standards of admission which have resulted in a bar 99 per cent white in a nation whose population is some 20 per cent non-white. Finally and long overdue, the University of Washington School of Law, along with many other law schools throughout the country, abandoned the admission practices which had resulted in a racially exclusive legal profession, and made special efforts to admit and train for the practice of law promising non-white applicants who, while qualified to become lawyers, would have lost out in a strict test of credentials for the limited number of spaces available at the law school.

As such, this admissions program recognized the existence of past discrimination, its adverse effect upon minority participation in our society, and the need for immediate rectification of such injustices; and it endeavored to make constitutional mandate a reality for members of racial minorities. As the President of the University of Washington explained:

> More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges

> in the University and the University of Washington, in particular, given the racial distribution of this state.
>
> • • •
>
> So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.[8]

The Supreme Court of the State of Washington, reversing its Superior Court, found that this preference given to a reasonably small proportion of qualified minority group applicants did not deny equal protection of the laws to rejected white applicants with superior paper credentials, since the law school was using race to further the state's "undeniably compelling" interest in alleviating "the shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—" and "in producing a racially balanced student body." 507 P.2d at 1184.

This Court's decision in this case will affect the futures of similar minority student programs at publicly supported law schools throughout the country.

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[8] *DeFunis* v. *Odegaard*, 507 P. 2d 1169, 1175 (1973).

ARGUMENT

Summary of Argument

Respondents and other Amici will essentially argue that law schools have discretion under the federal Constitution to consider affirmatively race as an element in admission policy to meet the compelling state interest in overcoming the effects of past racial exclusion of blacks and other non-whites from student bodies and alleviating the acute shortage of non-white lawyers which exists throughout the country. We agree with that position amply supported by several of this Court's precedents and will not belabor it. We go further! We argue that there is a *duty* on all publicly supported law schools in the country to take affirmative action to end and counteract the historic pattern of exclusion of non-whites from the legal profession and the legal system.

We believe that duty arises from two separate sources. On the one hand, every one of the nation's "white" law schools bears a personal responsibility for the historic exclusion of non-whites from the legal profession because they have sanctioned and enforced unvalidated admissions standards and devices which have effectively screened out a disproportionate number of qualified non-whites from the law schools, and, consequently, from the bar.

Secondly, the nation's law schools must bear a substantial part of the collective social responsibility for the general exclusion of non-whites from the legal profession and legal institutions as a result of myriad legal, social and educational discriminations over hundreds of years. If these myriad social inequities and injustices have left disproportionate numbers of non-whites ill-equipped to compete in a strict credentials contest, then the law schools must reject strict credentialism in favor of a system which

guarantees admission to a substantial number of otherwise qualified non-white applicants.

Petitioners and their Amici stress that the right of racial equality in this country is strictly an individual and personal right, not a group right.[9] That assertion, whether a correct statement of constitutional doctrine or not,[10] misses the point this Court has emphasized for the past 20 years—the only way to enforce individual rights of racial equality is through remedies that run to the group. Just as the individual right to equal educational opportunity can only be enforced through a unitary school system, and just as the voting rights of each black person require protection of registration rights for all blacks, so the right of each non-white to equality within the legal/political system requires that substantial numbers of otherwise qualified non-whites be admitted to full participation in that system. Like segregated schools, an exclusionary legal system constitutes a badge of inferiority imposed upon all non-whites, deprives each and every member of the excluded group of full participation in the social and political mainstream, and feeds what the New Jersey Select Commission called "the feeling of Negro powerlessness."[11]

Thus, every public institution which controls access to that legal/political system must devise means to effectuate the remedy, just as surely as boards which control voter

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[9] See Petitioners' Opening Brief at 15; Jewish Rights Council Brief at 7; Advocate Society Brief at 9-10.

[10] Amici do not consider it necessary to argue the point in this case. But see Kinoy, "The Constitutional Right of Negro Freedom," 21 Rut. L. Rev. 387 (1967); and Askin, "The Case for Compensatory Treatment," 24 Rut. L. Rev. 65 (1969).

[11] Report for Action, at 162.

registration must devise means to guarantee that all qualified non-whites can register whether or not those boards are in fact responsible for the past exclusion.

In addition, we wish to call to the Court's attention the social consequences of reversal in this case. The Rutgers Law School Minority Student Program, one of the oldest and most extensive in the country, has had significant success in adding non-white lawyers to the American Bar. That success depended upon a system of "preferential" admissions quite similar to that employed by Respondent University of Washington. Should this Court strike down such programs, it will represent an irreparable blow to the cause of full racial equality first set in motion by this Court 20 years ago in *Brown* v. *Board of Education,* and will result in keeping America's racial minorities in a colonial status for the foreseeable future.

I. A Publicly Supported Law School Has an Obligation to Establish Admissions Standards Which Will Assure Entry of a Substantial Number of Qualified Non-White Students in Order to End Their Historic Exclusion From the Legal Profession

Other briefs submitted on behalf of Respondents stress the *discretion* which the Constitution accords to public institutions to consider affirmatively race as an element in admission policy if doing so promotes the state's compelling interests such as guaranteeing an integrated student body and/or alleviating the shortage of non-white lawyers. Amici concur in that position, and note that this Court appears to have already confirmed the "plenary" power of public educational institutions to do so. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1971).

We do not wish to recanvass those arguments here. We go further! We ask this Court to declare not only the discretion but the *duty* of Respondent law school to act as it did to guarantee admission to the school of qualified non-whites. By doing so, the Court will light a beacon signaling to all public institutions their obligation to eliminate official racism from American life, and will ease the presently enormous burden on those institutions which have to date shouldered that obligation voluntarily.

A. The Historic Exclusion of Blacks and Other Minorities From the Legal Profession and Its Consequences

Although formal slavery ceased during the Civil War, the notion of white superiority did not end at Appomatox. As Mr. Justice Douglas, concurring in *Jones* v. *Mayer Co.*, 392 U.S. 409, 455 (1968), said:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die.

Indeed, inevitably, as in all the cases referred to by Mr. Justice Douglas, it is this seemingly never ending unwillingness that confronts this Court once again.[12] For, of

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[12] The continuing impact of African slavery on the national psyche has been put dramatically and concisely by two black psychiatrists, Grier & Cobbs, in a book *Black Rage* (1968):

> Long ago in the United States basic decisions were made. The most important of these made color the crucial variable. This began as the cornerstone of the system of black slavery. After refinements, it has remained to become embedded in the national character. Persisting to this day is an attitude, shared by black and white alike, that blacks are inferior. This belief permeates every facet of this country and it is the etiological agent from which has developed the national sickness. (25)

course, one of the hallmarks of slavery was the determination to resist efforts to educate the slave. As the pre-*Brown* graduate school cases involving law school admission, e.g., *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Sweatt* v. *Painter,* 339 U. S. 629 (1950), as well as *Brown* and its progeny amply demonstrate, perhaps the greatest resistance to finally eradicating the effects of slavery is on the part of those who would still today deny equal educational opportunities to blacks.

Nowhere has this phenomenon been more evident than in law school admission policies.

Until the 1950's most law schools were completely closed to blacks by law.[13] Even after blacks were held legally entitled to admissions, the majority of law schools admitted few, if any, blacks. Thus, as recently as the 1964-65 academic year, only 701 blacks were enrolled in law schools approved by the American Bar Association,[14] out of a total of 54,265 law students,[15] less than 1.5 per cent.

And, of course, given the historic resistance to educating blacks, law school admission policies were justified—if and when called into question—by the simple assertion that blacks were not "qualified" by the standards of the

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[13] Davis, *Negroes in American Society,* 163 (1949); Leflar, "Legal Education: Desegregation in Law Schools," 43 A.B.A.J. 145 (1957).

[14] O'Neil, "Preferential Admissions: Equalizing Access to Legal Education," 1970 University of Toledo Law Rev. 281, 305. Of this total minority enrollment, 434 were in the 145 predominantly white law schools, an average of 3 blacks per school, while 267 were in the 6 predominantly black law schools.

[15] Ruud, "That Burgeoning Law School Enrollment Slows," 59 A. B. A. J. 150, 151 (Feb. 1973).

white majority. (Neither, of course, was the slave qualified simply to learn to read and write under those standards.)

The figures concerning Chicanos and Indians are even more appalling. In California, for example, which has a Chicano population of more than 2,000,000,[16] only three were graduated from major California law schools in 1969.[17] As of 1969, no American Indian had ever received a law degree from the universities of Arizona, New Mexico, or Utah[18] despite the large Indian population of those states.

These patterns of enrollment in law schools were obviously reflective of the situation in the practice of law itself. The American Bar Association did not open its doors to "welcome blacks into its ranks" until about 1956.[19] Such policies have resulted in a vast shortage of minority group lawyers available to serve their immediate communities particularly when contrasted with the number of white lawyers. Of 324,818 lawyers in the United States in 1971,[20] only 3,845[21] (slightly more than one

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[16] Reynoso, "La Raza, the Law and the Law School," 1970 Toledo Law Rev. 809, 814.

[17] Id. at 816.

[18] O'Neil, *supra*, at 296 n.46.

[19] Levins, "The National Bar Association—Not Just an Option," 53 Judicature 390, 392 (1970).

[20] The 1971 Lawyer Statistical Report, 12.

[21] Toles, The Negro Lawyer in the United States, 112 Cong. Rec. A5458 (1966).

per cent) were black. Yet over 11 per cent of our nation's population is black.[22] Thus while one white lawyer exists for each 631 whites in the population, there is only one black lawyer for each 5,736 black inhabitants of the United States!

The ratios of black lawyers to black citizens in the South are even worse than the national average: Georgia, 1 to 37,500; North Carolina, 1 to 16,000; Louisiana, 1 to 38,500; Alabama, 1 to 40,500, and South Carolina, 1 to 75,400.[23]

Comparisons such as these are similar for other minority groups. In the city and county of Denver, Colorado, for example, about 9 per cent of the population is of Chicano or Spanish-American descent, yet only about 10 of the 2,000 attorneys practicing there in 1967 (one-half of one per cent) had Spanish surnames.[24] At the beginning of 1967, the Bar of California reported a total membership of 29,409 attorneys. By actual count, only 229, that is less than one per cent, had Spanish surnames, making the ratio of Anglo attorneys to Anglo people one in 530, while the ratio of Spanish surnamed attorneys to Spanish surnamed people was one in 9,482.[25]

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[22] U. S. Department of Commerce, Bureau of Census, National Origin and Language, 1 (1973).

[23] Note, "The Legal Needs of Black Owned Businesses in Los Angeles," 20 UCLA L. Rev. 829, 831 n.20 (1973).

[24] University of Denver College of Law, Progress Report to the Ford Foundation: Law School Preparatory Report for College Students of Spanish-American Descent, at 3 (1967) (mimeo.).

[25] Reynoso, *supra*, at 816.

In New Jersey, with a Spanish-speaking population of 300,000, there are an estimated three Puerto Rican lawyers.[26] "The situation appears to be no better in Los Angeles, San Antonio, Spanish Harlem, or in other areas of special need. Legal services are even less readily available to the American Indian and Eskimo community, with only a handful of lawyers belonging to each of the smaller minorities."[27]

The State of Washington is a participant in this system of vast under-representation of minority group members in the legal profession. According to the United States Bureau of Census, in 1970, Washington had only 15 black lawyers[28] out of a black population of 71,308,[29] as compared to 4,974 white lawyers[30] out of a white population of 3,251,055.[31] Thus in Washington there is a ratio of one white lawyer for every 654 white persons, while there is only one back lawyer for every 4,754 black persons.

Judge George Crockett commenting on the effects of black exclusion from the legal profession, said, "As a consequence of a pattern of racism in law enforcement, every American non-white brought into contact with the law was

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[26] Cabranes, "Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education," 25 J. Legal Ed. 447, 450-51 (1973).

[27] O'Neil, *supra*, at 296.

[28] United States Dept. of Commerce, Bureau of Census, Characteristics of the Population, Part 49, 489 (1973).

[29] Id. at 41.

[30] Id. at 489.

[31] Id. at 41.

obliged from his first moment of contact with the law to encounter, without exception, white faces at every stage of the most traumatic experience of his life."[82] This is undoubtedly a factor in the finding by the Kerner Commission that

> Some of our courts, moreover, have lost the confidence of the poor. This judgment is underwritten by members and staff of this Commission, who have gone into the courthouses and ghettos of the cities torn by the riots of 1967 . . . .
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> We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite the fires of disorders.[83]

There are other reasons why it is of immense social and legal importance to have a substantial number of non-white lawyers. As Mr. Justice Brennan has observed, black lawyers "most clearly understand the problems and difficulties found by members of the Negro community."[84] While, of course, many white lawyers have and will continue to give outstanding legal representation to black clients and black interests, these lawyers can never share the experience of living a lifetime in a black skin. Studies recently conducted in the South among the minority population emphasize the need for non-white lawyers:

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[82] Bell, "Racism in American Courts: Cause for Black Disruption or Despair?," 61 Calif. Law Rev. 165, 176, n.38 (1973).

[83] Report of the National Advisory Commission on Civil Disorders, at 183. (Hereafter referred to as National Commission Report).

[84] 89 N. J. L. J. 801, 808.

> A recent survey of several North Carolina counties conducted under the auspices of the American Bar Foundation disclosed not only a critical lack of available legal services, but a feeling by some black residents of the area that white lawyers were simply not accessible to them. Intensive studies of the Negro bar in Southern states confirm this finding; particularly where the case is a controversial one or is potentially divisive along racial lines, white attorneys may be neither able nor willing to take it on even if they are practicing in the area and ready to handle some real problem of the black community. Finally, the white or Anglo lawyer is far less likely than the man who comes from the ghetto or the *barrio* to understand the background of the case, to be able to locate and interview witnesses, to gather material evidence within the community, and so on. Certain tasks can be performed best (and sometimes only) by one who knows the community and its people.
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> The client's ability to communicate freely and fully with the attorney is as vital as the actual availability of an attorney. Clearly, racial or ethnic identity between lawyer and client will enhance or promote such communication. Where the client's basic tongue is Spanish, the advantage of an attorney fluent in that language is plainly apparent. For the black client, the value of a black attorney may be subtler and independent of language barriers, but it may be no less substantial in psychological terms.[88] (Citations omitted.)

The importance of having non-white lawyers is not limited to the benefits that will be gained in eliminating

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[88] O'Neil, *supra*, at 297-98.

racism in the legal system, but extends to every phase of life in society.[36]

Charles V. Hamilton, Professor of Political Science at Columbia University, asserts that one of the major causes of urban violence is that minority groups are, for the most part, not included in the decision making processes involving themselves.

> My idea of a legitimate political system involves the feeling among citizens that they have a personal stake in what is going on. People do not blow up or burn down what they feel they are a legitimate part of.
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> We can concentrate our efforts on programs aimed at how much money we can spend and how fast we can spend it. We can devise public and private ways to build new houses, new schools, and new recreational areas. But if we just donate these things . . ., I am suggesting we will find that those same beneficiaries, who are still excluded, will take those goods and services and still really blow up the cities. And they will do so precisely because they have not really been included in—where the decisions about housing, schools, recreational areas etc., are made.[37]

The Kerner Commission discovered that members of the black community agreed with Professor Hamilton's

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[36] Gordon Allport in his classic study, *The Nature of Prejudice*, 261 (1968) suggests that an increase in the number of black lawyers might have the effect of reducing prejudice against the black community in general.

[37] *Urban Violence*, 48 (Daly, ed. 1968).

"idea of a legitimate political system." The commission found that:

> [G]hetto residents increasingly believe that they are excluded from the decision making process which affects their lives and community. This feeling of exclusion, intensified by the bitter legacy of racial discrimination, has engendered a deep seated hostility toward the institutions of government.[38]

The person most likely to become involved in the decision making or political process in any community is the lawyer.

> By its very nature, the lawyer's profession binds him functionally to his community.
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> A lawyer is expected to do things not really a part of his practice of law, simply because he is a lawyer.
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> It is evident from this that the Black bar supplied much of the leadership in all phases of the Black community.[39]

When one is talking about "leadership," one is really talking about the three branches of government. Aside from the courtroom, the lawyers' most familiar positions in our society are in the executive and legislative branches of government.

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[38] National Commission Report, *supra*, at 149.

[39] Shuman, "A Black Lawyer's Study," 16 How. L. J. 225, 251-252 (1971).

> No occupational group stands in more regular and intimate relation to American politics than the legal profession. Lawyers make up a large proportion of American politicians at all levels and in all branches of government, in the political parties and in other political organizations. The affinity of law and politics as vocations is a matter of record. In the United States, probably more than any other nation, lawyers are the 'high priests of politics.' . . . That lawyers have an almost complete monopoly of public offices connected with law enforcement and with the administration of law in the courts is not surprising. But they are also prominent as an occupational group in the executive and legislative arenas of government. This has been true from the earliest days of the republic.
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> There is no need to belabor further the fact of the lawyer's ubiquity in politics. It is surely an outstanding phenomenon of American political life.[40]

As might be expected, the shortage of minority members of the legal profession, is reflected in their representation in the halls of government. In the 93rd Congress, of 435 House members, only 15[41] were black, and of 100 Senators, only 1 was black.[42] In the 1971 elections, the

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[40] Eulau & Sprague, *Lawyers in Politics: A Study in Professional Convergence*, 11, 13 (1964).

[41] Congressional Quarterly Almanac, Vol. XXVIII at 1036 (1972).

[42] *Ibid.*

total number of blacks elected to office was 1,860.[43] This represents less than .05% of the total 522,000 elected officials in the nation.[44]

> In the administrative areas of government, in the execution and enforcement of the laws, attorneys likewise enjoy a special position. The ABA has reported that 'ten per cent of American lawyers are employed in government positions' and that 'in the executive branch of government, law training is a recommendation for all kinds of policy-making and administrative-agency positions.' Here again we find gross underrepresentation of Blacks. For example, there are only 69 Black mayors, only 275 Black law enforcement officials (exclusive of policemen), and but a handful of other Black administrators in America today.
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> If the degree of participation, influence, and arguably control exercised by lawyers in all aspects of the governmental system is juxtaposed with the dearth of Black participation and influence in the legal profession, then one significant justification for remedying the problem of 'underrepresentation' may be seen. By increasing the number of Black lawyers, it is at least arguable that a greater degree of Black participation in the governmental processes will result.[45]

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[43] 1972 Information Please Almanac, at 95.

[44] Edwards, "A New Role for the Black Law Graduate—A Reality or an Illusion?," 69 Mich. L. Rev. 1407, 1413 (1971).

[45] *Id.* at 1414.

In the middle 1960's, law schools around the country began to recognize the harmful social consequences of their discriminatory admission policies. Their response was to increase the number of non-white law students by establishing minority students' programs much like that of the University of Washington. The results have been promising; the number of minority students enrolled in law schools in 1973 has risen to 7,601,[46] up more than ten-fold from 701 in 1964.

This figure, which represents nearly twice the number of black lawyers currently practicing, should cause the non-white bar to more than double in the next few years. In spite of these positive signs, however, the number of minority lawyers is still proportionately well below that of their white counterparts.[47]

To curtail these programs at this time would be most unfortunate, since minority Americans have a long way to go before it can be said that they have fair representation in the legal/political system of the United States.

If Black and other minority Americans are going to achieve their rightful place in our society; if they are going to be able to develop their own leadership, so that their representation in the decision-making processes in our society is reflective of their numbers in the population; if they are going to be able to make decisions which

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[46] Association of American Law Schools, 1973, Survey of Minority Group Students in Legal Education (mimeo).

[47] O'Neil, *supra*, at 295, points out that 30,000 more black lawyers are needed to achieve parity with the white population.

fundamentally affect the state of our economy,[48] if they are ever to overcome "the feeling of Negro powerlessness," then the number of minority lawyers in our society will have to increase drastically.

B. Public Law Schools Which (Like the University of Washington) Have Found That the Use of Unvalidated Testing Devices Has Resulted in Denial of Admissions to Non-Whites Have an Obligation to Employ Alternative Criteria in Order to Admit Non-White Students

1. The admissions criteria used in Respondent's Minority Student Program are those traditionally recognized as crucial for the prospective lawyer.

The claim that preferential admissions violate traditional academic standards rests upon an assumption, the fallacy of which should be apparent to anyone who clearly understands the admissions process; that is, admissions decisions derive from simple mathematical projections about the aca-

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[48] "Just as lawyers were critically influential in building the American polity and remain so in guiding it, they were equally influential in shaping the American economy, and they continue to be so. Not accidentally, perhaps, the legal profession grew most conspicuously with the rapid growth of commerce, finance, and industry in the decades around the transition from the nineteenth century to the twentieth. Law was 'one of the careers through which a man could attain influence and wealth even without having capital at the start; and the fortunes accumulated by a few men at the bar were taken as an index of its normal possibilities.' Lawyers not only serve all kinds of economic enterprise in one professional capacity or another, but they also sit as influential members on the boards of banks, railroads, manufacturing concerns, and educational institutions." Eulau & Sprague, *supra*, at 13. (Footnotes omitted).

demic or intellectual ability of applicants. Although there is a grain of truth in this assumption, it seriously oversimplifies what may well be the most complex process in American higher education.[49]

Until recent years, the admissions process at law schools involved a thorough analysis of each applicant, considering academic ability, experience, motivation, interest and personality factors. While admissions committees utilized Grade Point Averages (GPA) and Law School Admissions Test (LSAT) scores, a recent study finds that greater emphasis was placed upon non-numerical data, including appraisals from former teachers, interviews, and indications from the student's file as to employment experience, extra-curricular activities, motivation and interest in law school and maturity.[50] This process reflected criteria that the profession deemed necessary to produce capable lawyers. As the numbers of persons applying to law schools spiraled over the past few years, admissions committees, hampered by time, have been unable thoroughly to evaluate the more important subjective criteria for admissions, and have increasingly come to rely upon numerical data, utilizing the GPA and LSAT—arriving at a magic combination of the two known as PFYA, Predicted First Year Average. Thus, the traditionally recognized criteria became of secondary concern, and are often abandoned altogether when the numbers of applicants become unmanageable for admissions committees. As recently stated in the American Bar Association Journal:

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[49] O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 Yale L. J. 699, 701 (1971).

[50] Stephenson, "Why Law Schools Shouldn't Play the Numbers," 59 A. B. A. J. 492 (1973).

> The legal profession certainly does not discount intellectual promise and academic accomplishments but it traditionally has placed much emphasis on qualities of character and maturity, self-discipline, leadership, and personality attributes. These apparently no longer matter at law schools that employ a version of slide-rule admissions, where the regeneration of the legal profession has been reduced to a combination of two figures of three digits each.[51]

Concern of test developers has grown as schools placed greater reliance upon standardized tests that were not designed to be the crucial factor in admissions, but merely one index of indicated first year law school performance.[52] As stated by Peter Winograd, director of law programs at Educational Testing Service (ETS):

> There are many in our professions, on our faculties, indeed on our admissions committees, who, perhaps being misled by the precision with which LSAT scores are reported, tend to give the test more weight than it can reasonably bear.[53]

The ETS Handbook for Law School Deans and Admissions Officers states ". . . predictions based on LSAT scores and undergraduate grades is far from perfect. There will be a great number of cases where prediction misses the mark by a moderate amount and a sizeable number

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[51] *Id.* at 494.

[52] Educational Testing Service, Operations Reference Book, Law School Admissions Service § 2.

[53] Winograd, "Law School Admissions: A Different View," 59 A. B. A. J. 862 (1973).

where actual performance will be directly opposite from predicted performance."

ETS recognizes that these problems are magnified in interpreting minority student performance on the LSAT.

> Scores on the LSAT as on other tests, never completely represent the potential of any student. This is especially true for American Indian, Black, Mexican-American and Puerto Rican students whose educational experience, in and out of school, has differed significantly from that of the great majority of students. However, it should be borne in mind that tests such as the LSAT are best conceived of as measures of developed abilities—that is, they reflect the product of cumulative educational experience over a long period of educational growth and development. For the most part, the traditions and experience of American Indians, Blacks, Mexican-Americans, and Puerto Ricans have not been influential components of this cumulative education. In effect, the LSAT can be utilized to indicate the extent of educational damage resulting from unequal educational opportunity as well as for a basis of comparison with other candidates in terms of the elements represented in the tests.[54]

The University of Washington, as well as other law schools which have minority admissions committees, has recognized the limitations of such tests. It has returned to more subjective criteria, traditionally valued as crucial, and away from mere numerical indicators to gauge the academic potential of minority applicants. As explained in the opinion of the Supreme Court of Washington:

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[54] Educational Testing Service, Operations Reference Book, *supra*, § 2, p. 5c.

> All files of minority applicants were considered by the full committee as warranting their attention regardless of the PFYA of the individual applicant . . . In reviewing the files of minority applicants, the committee attached less weight to the PFYA in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school.[55]

This committee considered other indices of intellectual ability and academic promise and concentrated on indicators of character, motivation, maturity, and self-discipline, leadership and personality. Thus, the "different standards" in evaluating white and non-white applicants, is *not* a reflection of lower standards for minority groups, but a reflection of the fact that minority admissions looks to the traditionally important criteria which have been all but abandoned for non-minority students.

The major misinterpretation of this separate selection process is that minority students are "unqualified" for law school. Such opinions reflect confusion about the term "qualified" even accepting, *arguendo,* the validity of numerical tests.

> When the applicant population exceeds the size of an entering class by a factor of 10 or more—a finer screen is necessary . . . the result is that many thousands of applicants qualified in the absolute sense, are nevertheless not 'qualified for admissions.' Law School minority programs typically select minority candidates from among this group of qualified applicants. That such applicants might not be admitted if strict numerical standards were applied cannot justify saying they are unqualified for law study.[56]

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[55] 507 P. 2d at 1174-75.

[56] Winograd, *supra,* at 101.

The University of Washington's regular admissions policy, while considering non-numerical factors to some extent, is essentially a "numbers game"; its minority admissions program is not. It places less reliance upon numerical standards and examines subjective criteria more fully than is possible in an overburdened regular admissions process. Thus, the criteria used for minority admissions reflect a comprehensive review of requisite attributes for qualified students, those criteria traditionally recognized as crucial to training capable lawyers.

2. *It is proper for law schools to mitigate reliance on the Law School Admissions Test in admitting nonwhite students since its validity as a predictor of success in the legal profession has not been demonstrated.*

Admission to law school cannot be viewed in isolation; it is, in its broader context, the first stage of admission into the legal profession. One cannot become a lawyer, with rare exceptions, without attending an accredited law school. Thus, any selection device for admission to law school, in effect, selects future members of the profession, just as apprenticeship criteria determine future craftsmen.

The Law School Admissions Test was only intended to supplement the undergraduate record and other information about the student in the assessment of his/her competence for law school work,[57] and was designed only to predict first year law school grades.[58] Yet because of the administrative burdens posed by the deluge of applicants in

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[57] Educational Testing Service, Operations Reference Book, *supra*, § 2, p. 1.

[58] Educational Testing Service, LSAT Validation Study Service for Rutgers University, at 2 (1969).

recent years, it has become a convenient crutch for fast decision and probably the major determinant of admission to the majority of American law schools. Given this increasing reliance upon the LSAT as a factor in admissions decisions, the necessary conclusion is that the LSAT constitutes a prerequisite for employment in the legal profession.

In view of this, it is necessary to examine the LSAT against the standards that the courts and the federal government have established to judge whether employment tests are discriminatory. According to the Department of Labor ". . . evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated . . . under no circumstances will the general reputation of a test, its author or publisher, or casual reports of test utility be accepted in lieu of evidence of validity."[89]

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court held that employers cannot require a high school diploma or a passing score on a standardized test when (a) these criteria are not reasonably related to the job to be performed, and (b) their application excludes a significantly higher proportion of blacks than whites.

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[90]

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[89] U. S. Dept. of Labor, Validation of Employment Tests by Contractors and Subcontractors: Subject to Provisions of Executive Order 11246 (1968) 2-6.

[90] 401 U. S. at 431.

While the *Griggs* requirement results from a statutory rather than constitutional mandate, it has been held that the "Fourteenth Amendment imposes upon [public] defendants prohibitions against race discrimination that are at least as great as those levied upon private employers [under Title VII]." *Baker* v. *Columbus Municipal School District*, 329 F. Supp 706, 721 (N. D. Miss. 1971). Title VII standards, as interpreted in *Griggs*, have been extended beyond private employment to public employment, jury selection and school desegregation cases. *Chance* v. *Bd. Examiners*, 458 F. 2d 1167 (2d Cir. 1972), *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972), *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351 (N. D. Calif. 1972), *Carmical* v. *Craven*, 457 F. 2d 582 (9th Cir. 1971). In *P.* v. *Riles*, 343 F. Supp. 1306 (N. D. Calif. 1972), challenging the use of I.Q. tests as a determinant in placing black students in educable mentally retarded classes, plaintiffs relied upon the Title VII conceptual scheme as developed in *Griggs*. The Court held that ". . . this same [*Griggs*] approach should be utilized in analyzing plaintiff's contention that the use of the I.Q. tests to determine placement in EMR classes violates their right to equal protection of the laws. There are several reasons why the burden is shifted in employment discrimination cases; and all of them dictate that the same process be followed in the instant case." 343 F. Supp. at 1309. In *Baker* v. *Columbus Municipal School District*, *supra*, it was held that these standards should be applicable to the National Teachers' Examination. Similarly, the LSAT, challenged on equal protection grounds, should be subject to as strict scrutiny under the 14th Amendment as it would be under Title VII.

Applying these standards, it is indisputable that the LSAT has had the effect of excluding a higher proportion of blacks than whites from the nation's law schools

and the legal profession.[61] (See Part I A, *supra*). And as this Court said in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 805 n. 19 (1973), statistics of racial composition may "itself [be] reflective of restrictive or exclusionary practices."[62]

Moreover, the LSAT has not been validated as a criterion reasonably related to legal job performance. There have been no studies completed consisting of empirical data where the "important elements of performance in the legal profession" have been established. Standards for success in the profession have not even been delineated and tested. Nor is it possible to state that predicting performance of first year law students serves to predict their future performance in the legal profession.

A 1968 study of law students taking the California bar exam indicated that the LSAT is not an accurate predictor of performance on the bar nor is it a good predictor of total law school grades. Findings indicated that Total Law School Grades was the most accurate predictor of performance on the bar.[63]

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[61] 1967 AALS Minority Group Study, at 166, reports that scores for black students averaged about 165 points below the median. The historical effects of the LSAT is partially evident in the fact that 12 per cent of the population is black while only 1 per cent of the bar is black. Gelhorn, "The Law School and the Negro," 1968 Duke Law Journal 1069, 1073. In some part, this is due to relatively small numbers of minority applicants, however test scores account for a major part of the result.

[62] See also Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination," 71 Mich. L. Rev. 59, 91-94 (1972).

[63] Richard W. Watkins, The Comparability of Grades on the California State Bar obtained at Different Admissions, Educational Testing Service, SR 68-1-WO (March 1968). The correlation between performance on the LSAT and the bar was .19, meaning that 19 times out of 100 the LSAT was an accurate predictor of bar exam performance, hardly an accurate barometer. Correlation between the LSAT and Total Law School Grades was .33, barely statistically significant. The highest correlation was Total Law School Grades with bar examination performance, .69.

Studies have recently been undertaken by ETS sponsored by the Law School Admission Council, American Bar Foundation, Association of American Law Schools and the National Conference of Bar Examiners to examine the LSAT in light of performance throughout law school and performance on the bar on a national basis. However, such studies will not be completed for two years. ETS eventually hopes to undertake a study to establish criteria for evaluating success as a lawyer.[64] Until the completion of these studies, the unvalidated LSAT exam is being utilized way beyond its purpose; it effectively selects lawyers when it is designed only to select first year students.

Even if prediction of success as a first year law student is an acceptable criterion for a test used to select future lawyers, the LSAT has not been validated for minority students and would, therefore, not meet EEOC guidelines.[65] In 1964, the Law School Admission Council authorized the first extensive study of the interpretation of scores for "culturally deprived" students. While the data proved inconclusive as to the first issue, preliminary studies indicated that the median score for black students was about 165 points lower that the LSAT's historical median.[66]

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[64] Alfred Carlson, Charles Werts, Proposal: Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results, Educational Testing Service (February 1973).

[65] Executive Order 11246 states ". . . only a test which has been validated for minorities can be assumed to be free of inadvertent bias."

[66] 1967 Association of American Law Schools Minority Group Study, 166.

From this, one could conclude either that there is an inherent flaw in the black students or an inherent flaw in the LSAT. In fact, it is the latter conclusion that a further preliminary study done by ETS reached. The study, testing "culturally different" students against their dominant culture counterparts, reached only one conclusion of statistical significance: the LSAT is not a good predictor for the culturally different."[67]

Recently, ETS has undertaken a study: "Predicting Law School Grades for Blacks," that will not be completed for two years. The preliminary report suggests, however, that the admissions test is as accurate (or inaccurate) a predictor of law school success for "culturally deprived" as for more fortunate students. However, as the dean of a black law school has observed:

> Is it any wonder that . . . culturally deprived and disadvantaged people are not capable of demonstrating qualifications to study law when their ability is measured by methods and criteria designed to test a group from which they have been effectively excluded both culturally and educationally . . . None of the . . . justifications for the present method of determining qualifications to study law are applicable to Negro youth. He has not been sufficiently exposed to cultural advantages and educational materials which tend to develop innate abilities . . . This being true, many Negro youth may be excluded from the study of law, not because they lack ability, but rather because inappropriate means of determining their ability have been and are being employed.[68]

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[67] Charles T. Consalus, Program Director, LSAT, The Law School Aptitude Test and the Minority Student, 513.

[68] Carl and Callahan, "Negroes and the Law," 17 J. Legal Ed. 250, 257-58 (1965).

The legal profession is concerned with developing criteria that are validly related to performance as a lawyer. Such research is necessarily a lengthy process. During that process reliance upon a standard which not only questionably meets its *stated* purpose—prediction of first year success—but results in far exceeding that purpose—selection of lawyers—is questionable at best. This is especially crucial when the effect of the LSAT as a law school selection device is the exclusion of a class of persons from the legal profession.

Employers utilizing tests that have not been validated are required to suspend use of the test until validation studies are completed.[69] It is equally as important that professional schools, mandatory links in the path toward employment, adopt similar standards. It was not only permissible, but essential that the University of Washington suspend the use of the LSAT for minorities in admission to the profession.

C. The University of Washington Law School Had an Affirmative Duty to Remedy the Effects of Past Discrimination

1. The source and nature of the duty.

Until the University of Washington Law School began implementation of its minority student program, it had—as had other American institutions of higher learning, including Rutgers University—shared in the exclusion of non-whites as a class from access to equal educational opportunities. Particularly, given its mission of training students for the practice of law, it had shared in the ex-

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[69] *Griggs* v. *Duke Power Co., supra.*

clusion of blacks as a class from the opportunity to be educated for the legal profession (See Part 1A, *supra*). We have described that exclusion, which continued well into this century, as an extension of the historic prohibition against educational training for blacks begun during the period of African slavery in this country.

With respect to this denial, as is true of black opportunity in all phases of American life—voting, jury service, access to public facilities, employment, housing, recreation, etc.—two things may be fairly said. First, that it was precisely the purpose of the Reconstruction Amendments and subsequently enacted civil rights legislation to end not only the denial of these opportunities but their continuing consequences as well. The cases in this Court making this point are, of course, legion. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Louisiana* v. *United States*, 380 U. S. 145 (1965); *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320 (1970); *Jones* v. *Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreation Assoc.*, 412 U. S. 431 (1973), are ready, recent examples. Second, given the purpose of these Amendments and laws, all public institutions responsible for the historic and continuing denial of black opportunity have an affirmative duty to act in such a way as to overcome the effects of past discrimination as a means of assuring meaningful present opportunities for black Americans. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U. S. 1 (1971); *Gaston County* v. *United States*, 395 U. S. 285 (1969); *Louisiana* v. *United States*, *supra*. And we can think of no public (or indeed private) institution in the United States that is not properly chargeable with contributing to the exclusion on racial grounds of blacks *as a class* from opportunity in all sectors of American life.

Surely, the officials of the University of Washington Law School, as well as officials of this institution, have acknowledged by their actions the pervasiveness of institutional racism throughout the society and their responsibility for seizing the options available to them in combatting it. Just as courts, when required by the commands of the Reconstruction Amendments and specific pieces of legislation enforcing them, have "not merely the power but the duty to render [decrees] which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana* v. *United States, supra,* 380 U. S. at 154, so all other public institutions are required, "so far as possible" to extirpate what this Court, as long ago as the *Civil Rights Cases,* 109 U. S. 3 (1883), and as recently as *Jones* v. *Mayer Co., supra,* has called "the badges and incidents of slavery."[70]

This is certainly not a novel proposition. State election officials, *Louisiana* v. *United States, supra,* those who conduct the machinery for selecting juries for state courts, *Alexander* v. *Louisiana,* 405 U. S. 625, 632;[71] *Carter* v. *Jury Commission of Greene County,* 396 U. S. 320 (1970); *Turner* v. *Fouche,* 396 U. S. 346 (1970), as well as public school officials, *Swann, supra,* and officials of public institutions for higher learning, *Norris* v. *State Council of Higher Education for Virginia,* 327 F. Supp. 1368 (E. D. Va. 1971—three judge ct.) aff'd *sub nom. Board of Vis-*

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[70] See generally, Kinoy, "The Constitutional Right of Negro Freedom," 21 Rut. L. R. 387 (1967).

[71] "The [jury] commissioners, in any event, had a duty 'not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds *Hill* v. *Texas,* 316 U. S. 400, 404 (1942).'"

itors of the College of William and Mary i.: Virginia v. *Norris*, 404 U. S. 907 (1971), have this duty. As the *Norris* court said, 327 F. Supp. at 1373:

> The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges but the state's duty is as exacting.

Thus the duty is not different merely because attendance below college is compelled, while students have to apply for college and law school.

Nor is the duty to remedy past wrongs limited to the agencies or officials directly responsible therefor. This Court has indicated, quite properly, where the issue has been presented, that all public agencies have the responsibility to conduct themselves in a manner that does not perpetuate the effects of past racial discrimination. For example, in *Gaston County* v. *United States*, 395 U. S. 285 (1969), this Court held that the defendant board of elections had a duty to follow a system of voter registration which did not impose additional burdens on blacks because they had been denied equal educational opportunity by school administrators over a period of many years. Pursuing that theme in its unanimous opinion in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court defined that duty as the "removal of artificial, arbitrary and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U. S. 424, 431 (1971). The *Gaston County* and *Griggs* cases once more recognize the illogic of asserting that the "indiscriminate imposition of inequalities," *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), can add up to equal treatment. It was recognition of this obvious and elementary proposition that properly led the Respondent law school to accept its duty

to provide a remedy for members of the groups which had so long been excluded from the law schools and the legal profession by a variety of discriminatory societal practices.

And as the officials to whom the judgment of whether law school applicants are qualified for admission has been committed, they are entitled to have that judgment sustained not simply because what they did was right, but because they did what they were required to do. Cf. *Porcelli* v. *Titus*, 302 F. Supp. 726 (D. N. J. 1969), aff'd., 431 F. 2d 1254 (3rd Cir. 1970), cert. denied 402 U. S. 944 (1971); and *Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971). Respondents were not entitled to remain indifferent to the many years during which no blacks were found "qualified" for entrance; indeed they were required to turn away from precisely the kind of neutral or "even-handed" application of admission standards that, if continued, would have perpetuated the long-standing discrimination. Against the claim of obligation to be "neutral" are arrayed the claims of years of past educational discrimination. In such circumstances, the commands of the Constitution must prevail. *Gaston County* v. *United States*, *supra*.

2. Proper discharge of the duty requires remedial action with respect to the affected group not merely with respect to individuals.

Petitioners and some of their Amici insist that the Fourteenth Amendment provides rights only for individuals, not for groups. This misses the point of 20 years of racial discrimination decisions by this Court. Individual discrimination on racial grounds occurs precisely because of iden-

tification of the victim as a member of a class of persons historically treated as separate and apart. *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the fountainhead decision, was a class action. All the cases trailing in its wake have emphasized the need for a remedy for discrimination running to the group. For only by dealing with the effects of class/racial antagonism can individual freedom be secured. In this country, black people were enslaved as a group, Jim Crowed as a group and segregated as a group. For that reason they can only be liberated as a group, and this is the clear meaning of this Court's decisions for at least two decades.[72]

Despite Petitioners' objections, Respondents were absolutely right in determining that their duty to mitigate the effects of past exclusion of non-whites from the law school required a remedial program in which all members of the excluded class were entitled to participate, not merely those who could demonstrate that they were targets of specific discriminatory treatment.[73]

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[72] See Askin, "The Case for Compensatory Treatment," 24 Rutgers L. Rev. 65 (1969).

[73] The brief of the Anti-Defamation League suggests that black people, following the views of Sir Henry Maine, should eschew group remedies and "move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society." (p. 22). To people who spent 250 years in slavery and the next 90 as the victims of segregation and Jim Crow legislation, this suggestion is too cruel to be humorous.

II. This Court Should Not Strike Down Programs Which Have Demonstrated That They Can "Work Now" to Help End the Historic Exclusion of Racial Minorities From the Legal Profession

A. The Rutgers Minority Student Program Convincingly Demonstrates That Special Admissions Programs Such as That Instituted by Respondent Can Bring Many More Qualified Non-Whites Into the Legal Profession and Help End Their Historic Exclusion From It

In the eight graduating classes from 1960 to 1967, Rutgers Law School in Newark graduated a total of 12 non-white students, an average of 1.5 per year.[74] But even some of this handful of blacks would not have been admitted if the school had adhered to a strict policy of color-blindness. For the Rutgers Law School admissions office, from at least the beginning of the decade, had been sensitive to the racial exclusivity of the school and sought out, among the applications it processed, promising non-white students whose paper records alone were insufficient to guarantee admission in a strict credentials competition.

In 1968, there were fewer than 100 black lawyers among the 8,000 members of the New Jersey bar.[75] Finally, in the spring of 1968, the Law School faculty, responding to what it perceived to be compelling and overwhelming social needs and a legal obligation to eliminate the fruits of white racism from its admission policies, voted overwhelmingly to establish a Minority Student Program. Motivat-

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[74] The law school graduated approximately a thousand students during that period.

[75] See Blumrosen, "Legal Education for Black Students: A Remedy for Class Discrimination," 1970 Univ. of Tol. L. Rev. 799, 803.

ing the faculty action was not only its own recognition of the gross underrepresentation of non-whites in the student body and at the Bar, but also the general political and social unrest that existed in the non-white communities of Newark, as in other urban centers, resulting from a "feeling of . . . powerlessness" on the part of the non-white populations. See Report of New Jersey Governor's Select Commission on Civil Disorders, 162.[76] Cf. *Porcelli* v. *Titus*, 108 N. J. Super. 301, 261 A. 2d 364, 369 (App. Div. 1969), noting the social crisis caused by the dissatisfaction of the black community in Newark with its conditions of life.

The faculty was in agreement with the comments of Mr. Justice Brennan delivered at the law school's dedication ceremonies a year earlier that "the effort to provide equal rights and opportunities for Negro citizens . . . can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community."[77]

Emphasizing the faculty's legal *duty* to take affirmative action in the area of admissions was a feeling that past policies, in common with other law schools, had been racially discriminatory. This view was articulated by one faculty member, a former Chief of Conciliation for the United States Equal Employment Opportunity Commission, as follows:

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[76] This same finding was made by the counterpart National Advisory Commission on Civil Disorders, at 149:

> [G]hetto residents increasingly believe that they are excluded from the decision-making process which affects their lives and community. This feeling of exclusion, intensified by the bitter legacy of racial discrimination, has engendered a deep seated hostility toward the institutions of government.

[77] 89 N. J. L. J. 801, 808.

> The institutions of legal education have practiced a form of race discrimination by excluding blacks and other minority group persons from admission to law schools and hence from the practice of law. Mechanisms by which this exclusion has been accomplished involve recruitment and admission practices of the nation's law schools. Recruitment practices have included family preferences, reliance on references from within the profession, word of mouth encouragement and other actions which have effectively confined motive and opportunity to secure a legal education to white students. Admission practices have included devaluation of grades from 'inferior' colleges heavily attended by minorities, and reliance on the Law School Admission Test. Both of these factors measured the black student's potential for the practice of law against his possible ability to serve the white community, and both ignored the needs of the black community for legal services which included actions by representatives of minority racial and ethnic backgrounds. Even the correlation of college grades and LSAT scores with success in the practice among whites is not so clear as to preclude questioning these standards as the basis for admission practices. When the use of these standards produces segregated legal education, the doubt concerning their validity becomes an insistent question. The validity of these standards as measuring the ability to provide legal services to the minority community has not been established.[78]

The faculty thus set a goal of admitting 20 qualified minority students in the fall of 1968, to be increased to 40

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[78] Blumrosen, *supra* at 800-801.

in succeeding years. A special committee was established to recruit qualified non-white students, plan and execute the program, locate scholarship assistance and develop a program of remediation to help those students specially selected adjust to the first year of legal studies.

In evaluating applicants for admission under this Minority Students Program, the Committee placed little reliance on LSAT scores, but focused on undergraduate performance, including extracurricular activities, personal evaluations of former teachers and prior experience in business and/or civic activity indicating leadership potential.[79] The Minority Student Program Committee was instructed that if there was any question about locating qualified students to achieve the goals established, any student who had graduated from an accredited college or university in the top half of his/her class was to be considered presumptively qualified for admission. The goals established for admission under the Minority Student Program were separate from any non-white students who were admitted under the regular admissions process. However, it should be noted that in the six years of the Minority Student Program no more than six non-white stu-

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[79] It is suggested by one of Petitioners' Amici that they would find it permissible for a law school to apply such subjective evaluative standards and procedures across the board to all applicants, but not to minority applicants alone. (See Brief of American Jewish Congress at 7-8.) It is obvious that Amicus has never been an admissions officer at a major law school or other academic institution. Rutgers Law School, Newark, e.g., processes nearly 5,000 applications a year. Such personal evaluation of all applicants would require a many-fold expansion of its admissions staff, the cost of which would be prohibitive. It is a significant burden to do this even for the 600-odd minority applicants the school now processes each year, but not unmanageable in relation to its purpose.

dents[80] have actually entered the Law School apart from the special program.[81]

Of the 20 students found qualified for law study and with a potential as lawyers who entered the law school during the first year of the special program,[82] none would have been admitted but for the Minority Student Program. For example, only four of those 20 had LSAT scores above 500, while among the regularly admitted freshmen that year, very few had LSAT scores below 500.[83] Of these 20 students, 16 graduated with their entering class at the end of three years; two were delayed by scholastic difficulties but were graduated after four years; one left for academic reasons; and one withdrew for military service. Of the 16 graduates of this class of 1971, all are now members of the Bar in at least one state, except for one who returned to his native Nigeria as a representative of an American corporation.

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[80] Since the records of students admitted under the Minority Student Program are not separately maintained, these figures are not subject to exact verification.

[81] It is believed that some non-white students who were regularly admitted to the law school during that period chose instead to go to other—possibly more prestigious—law schools, some as a result of minority student programs operating at those institutions.

[82] It was coincidental that the school precisely met its goal of 20 in the first year. In most years since, the number of students entering under the minority program has fallen short of the goal.

[83] For the regularly admitted students in 1968, LSAT scores in the range of 500 could only be offset by a near perfect undergraduate average. The median LSAT score for regularly admitted students at Rutgers Law School, Newark, in 1968 was 583, and the median grade point average was 2.94.

All told, from the fall of 1968 to the present first year class, approximately 235 students have been admitted to the law school as a result of the Minority Student Program. Of the 92 students admitted during the first three years of the program, 66, or 71.7 per cent, have been graduated.[84] Approximately ten dropped out or were dismissed without readmission for academic reasons.[85]

Of these 66 graduates in the first three years of the program, law school records indicate that at least 44 have been admitted to bars in at least one state.[86] An additional three minority students who were permitted to transfer to Rutgers from other law schools were graduated during these three years. This overall total of 69 students who were graduated from the law school as a result of the Minority Student Program during the three-year span contrasts with the eight non-white students graduated by the law school in the preceding eight years.

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[84] Graduating classes of 1971, 1972, 1973.

[85] The remaining students unaccounted for in these figures have either transferred in good standing to other schools or have fallen behind their classmates. Of the latter group, many are yet expected to successfully complete law school. One died prior to graduation.

As noted earlier, separate records of students admitted under the Minority Student Program have not been maintained by the law school. However, the figures cited herein have been reconstructed by members of the Dean's Office at the law school and are essentially accurate.

[86] New Jersey, 37; New York, 2; Mississippi, 2; Connecticut, 1; Maryland, 1; North Carolina, 1; Tennessee, 1; Virginia, 1. Two students have been admitted to the bars of two states. The law school has lost contact with some of the graduates and does not know their bar status.

These 69 students, who would not have been admitted/or graduated from Rutgers Law School, Newark, had they not been eligible for admission under the Minority Student Program, have since launched their legal careers as follows:[87]

OEO Legal Services (includes 9 Reginald Heber Smith Fellows)	13
State or Municipal Government (includes 4 with Attorney General of N. J.)	11
Private law firms (2 in New Jersey; 2 in New York; 1 in Florida and 1 in Texas)	6
Federal Government (3 with EEOC; 1 with FTC; 1 with NLRB; 1 with U. S. Bureau of Prisons; 1 with Justice Department)	7
Public Defender	6
Private Voluntary Agencies	6
Judicial Clerkships (Includes one with Supreme Court of Connecticut and one with Supreme Court of Hawaii)	5
Private Corporations	4
Private Practice	3
Staff of elected public officials	2
Judicial administration	2
Graduate school	2

[87] Where a graduate has held more than one job since graduation, only the more significant is noted.

Legal education	1
Military service	1[88]

During the first five years of the program, only 17 per cent[89] of those admitted under the Minority Student Program failed to meet the school's academic requirements and were dismissed from school, at least temporarily, for poor academic standing.[90] The vast majority of the specially admitted students demonstrated that they had the capabilities of successfully completing the study of law.

B. The Consequences of Reversal in This Case Would Be to Strike Down Programs Which Have Demonstrated They Can "Work Now" to End Racial Exclusion in the Legal Profession and Would Be a Severe Setback to the Cause of Racial Equality in the United States

In the same year that the faculty of the Rutgers Law School in Newark instituted its Minority Student Program, this Court declared, in a unanimous opinion, that the duty on a public educational institution with a history of racial exclusivity was "to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 439 (1968).

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[88] Considered as a representative sample of any group of law graduates from any institution, the range of legal occupations is fairly typical.

[89] 28 out of 186. This does not include the present first year class.

[90] Until the current year, a student who got a grade of Unsatisfactory in three or more courses during two consecutive semesters was dismissed from school. The student might then be reinstated only by appeal to the faculty's Scholastic Standing Committee.

A number of public law schools across the country, including Rutgers and Respondent University of Washington, attempted to carry out that mandate by the establishment of special programs for admission of qualified minority group students into what had been essentially all-white institutions in the past. If ever a plan has worked to end racial exclusion, it is the Rutgers Minority Student Program, as the figures cited *supra* show. While the record before the court is silent as to the success of the somewhat more modest Washington Law School program under challenge here, there is no reason to believe that, permitted to flourish, it will not make its own contribution to ending the image and reality of the law as a profession for whites. It must be given that opportunity if we are to have any chance of reversing the movement of our nation "toward two societies, one black, one white —separate and unequal."[91] As the National Advisory Commission on Civil Disorders warned us, that drift "threaten[s] the future of every American." Programs such as those established by the law schools at Rutgers and the University of Washington show promise of dissolving that threat and making our future as a multiracial nation possible.

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[91] National Commission Report, at 1.

CONCLUSION

For the reasons set out above, as well as those stated by Respondents and the other amici supporting their position, the decision of the Court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife;
MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE
THE CITY OF SEATTLE

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife;
MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

BRIEF OF AMICUS CURIAE THE CITY OF SEATTLE

INTEREST OF AMICUS CURIAE

This brief of Amicus Curiae is submitted in support of the decision of the Supreme Court of the State of Washington in *DeFunis v. Odegaard*, 82 Wn.2d 11, 507 P.2d 1169 (1973) and the salutory legal principle that a state

"law school may, in consonance with the equal protection provisions of the state and federal constitutions, consider the racial or ethnic background of applicants as one factor in the selection of students." 82 Wn.2d at 13, 36, 42; 507 P.2d at 1171, 1181, 1187. Both the *DeFunis* decision and the rule of law announced have already had a favorable impact upon The City of Seattle and its residents for the reasons, among others, outlined in the next three paragraphs.

The decision lets the University of Washington law school continue its affirmative action program, which has enabled the City's law department, other governmental agencies, and private law firms to secure the talents of minority persons that would not have been available otherwise. In the long run, continuation of this program will assure that the City's municipal court judges, its municipal attorneys, and public officials with legal backgrounds will reflect the city's multi-racial population. Since its founding over five decades ago, graduates of the University law school have filled many important state and local government offices; and the high quality of the legal training provided gives promise that this tradition will continue.

The decision allows the University to carry on its affirmative action program in other professional schools with limited student capacity, such as medicine and dentistry, and for undergraduate studies; and it sets a precedent for other colleges and universities to do so. By educating a broad cross-section of students, the University provides a representative pool of professional talent from which the City, other governments, and private employers may draw to create and to maintain a multi-racial work force. This

is especially important in law enforcement, *Erie Human Relations Comm. v. Tullio*, 6 FEP Cases 733 (W.D. Pa. 1973) and in the higher level positions where a college education proves very useful in day-to-day performance and for promotion. The House Committee Report recommending passage of the Equal Employment Opportunity Act of 1972 stated:

> "The problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (*notably education, law enforcement, and the administration of justice*) with the result that the credibility of the government's claim to represent all the people equally is negated." (emphasis supplied) 2 *Congressional & Administrative News* 1972, 2137 at 2153;
>
> ". . . Americans rely upon the maxim 'government of the people', and traditionally measure the quality of their democracy by the opportunity they have to participate in governmental processes. It is therefore imperative that equal opportunity be the touchstone of the Federal system." Id at 2157

The City's experience with its own affirmative action program has shown that racial integration makes city government more responsive to citizen needs and viewpoints and sustains a broadly-based public confidence.

The *DeFunis* decision serves as an important precedent for sustaining the City's on-going activities to afford disadvantaged minorities effective equality of opportunity in municipal employment, against charges of "inverse discrimination," *e.g. Brabant v. City*, King County Superior Court Cause No. 757364. Under an Executive Order of the Mayor, dated October 16, 1972, adopted by the City Council by Resolution 23849 and implemented by Ordi-

nance 101548, all city departments are required to establish and maintain an effective affirmative action program with goals and timetables for employment of minorities at all job levels until the effects of inequality of opportunity are eliminated. Under Civil Service Commission Rule 7.03(j), the Secretary of the Commission may certify a qualified minority person for appointment without regard to the order of eligibles ranked by examination scores when necessary to implement a city department's Affirmative Action Program.

• • •

To reduce overlapping with other memoranda, this brief is restricted to the cases and authorities involving consideration of race in affirmative action programs and in evaluating test scores in employment settings. These cases are persuasive here because:

a) In both employment and education anti-discrimination cases, the law implements the Fourteenth Amendment to the United States Constitution, gives effect to the same fundamental principles and statutory purposes, and seeks effective equality of opportunity for all citizens. This touchstone supplies a standard to measure the governmental action under review;

b) Affirmative action programs in education and employment are often analogous. For example, apprenticeship and on-the-job training programs serve as a medium of teaching skilled trades that is sometimes as important to those participating and to the crafts or industry as a college or university education is in developing the abilities needed in professions and learned positions; and

c) The employment cases and those in education often

reflect comparable patterns (e.g., the use of tests and assignments based thereon) and analysis. Disparate racial consequences are not discriminatory in hiring or employment when compelled by an overriding business necessity, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); pupil assignments or curriculum differences disproportionately affecting disadvantaged minorities may only be made when necessary to fulfill an educational purpose, *Larry P. v. Riles*, 343 F. Supp. 1306 (D.C. N.D. Cal. 1972).

Affirmative action in education and employment are complementary to each other, and both are necessary to make the triad, "government of the people, by the people and for the people," expressed by President Abraham Lincoln over a century ago into a profound reality for all Americans.

SUMMARY OF ARGUMENT

Affirmative Action programs, such as that of the University of Washington, are appropriate:

I. To comply with the Civil Rights Act of 1964, as supplemented by the Equal Employment Opportunity Act of 1972, and Executive Orders of the President implementing them (pages 6-11 *infra*);

II. To overcome disadvantages that adhere in competitive examinations due to social, economic, or educational deficiencies of minorities caused by racial discrimination (pages 7-18 *infra*); and

III. To properly evaluate the abilities of minority aspirants where screening procedures would not otherwise fully portray the candidate's personality (pages 18-19 *infra*).

ARGUMENT

I. Affirmative Action Programs Equalize Opportunity

The Constitution of the United States, civil rights laws, and court decisions authorize adoption of affirmative action programs, such as that of the University of Washington, to overcome practices and usages that have or had a discriminatory effect on account of race, creed, or color and to counteract the consequences of past discrimination on that basis, *cf. Norwalk CORE et al. v. Norwalk Redevelopment Agency et al.*, 395 F.2d 920, 931-932 (2nd Cir. 1968).

The Fourteenth Amendment to the United States Constitution provides in part as follows:

> "Section 1. All persons, born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."
>
> • • •
>
> "Section 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

Section 1 outlaws racial discrimination by government, *Shelley v. Kraemer*, 334 U.S. 1 (1948); Section 5 empowers Congress to eliminate manifestations of discrimination by appropriate legislation, *Ex parte Virginia*, 100 U.S. 313, 345 (1880).

On July 2, 1964 the Congress enacted the Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241, 42 USC § 2000,

et. seq.). Title VI "Nondiscrimination in federally-assisted programs," § 601 and § 602 (42 USC § 2000d) withdraws federal participation from activity with racial discrimination, and directs action to effect its ban;

> "§601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
>
> "§602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . ."

Title VII pertaining to employment through section 703 (42 USC § 2000e-2) effectively forbade all practices "designed, intended or used" to discriminate by race:

> "Sec. 703(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or *classify his employees in in any way which would deprive or tend to deprive any individual of employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. (Emphasis supplied)
>
> • • •

"(h) Notwithstanding any other provisions of this title, *it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test*, its administration or action upon the results *is not designed, intended or used to discriminate* because of race, color, religion, sex or national origin." (78 Stat. 255, 42 USC § 2000e-2) (Emphasis supplied)

The succeeding sections created an Equal Employment Opportunity Commission, and gave it responsibility for enforcement (42 USC 2000e *et seq.*) *cf.* 29 CFR 1601; (30 Fed. Reg. 8407, *et seq.* June 30, 1965).

The President of the United States pursuant thereto issued Executive Order 11246 (30 Fed. Reg. 12,319), later superseded by Executive Order 11478, issued August 8, 1969 (34 Fed. Reg. 12,985) requiring that affirmative action programs be established and maintained in all phases of federal and federally-assisted activity to attain equal employment opportunity. Federal agencies must include affirmative action provisions in all grants-in-aid agreements, and state or local governments contracting with them will be bound thereby. In effect, Executive Order 11478 and various agency regulations interpret Section 601 of the Civil Rights Act of 1964 as a mandate to secure participation of all Americans, including minorities, *cf.* EDA Regulation 13 CFR Chapter III §311.60 *et seq.* 36 Fed. Reg. 20360 (1971).[1] The statutory phrase "no person . . . excluded" makes a double negation that is treated as a positive direction.

1. The Congress gave a similar effect to the Civil Rights Act in the Education Amendments of 1972 (P.L. 92-318, 86 Stat. 235) by defining "minority group" (§ 702(a)(3)), prohibiting certain grants to agencies that had "in effect" excluded "minority group childrtn" (§ 706(d)) and requiring participation in planning by their parents (§ 710(a)).

Where discriminatory practices or racial imbalance in an industry caused by past discrimination would permeate federally-supported activities, the courts have sustained vigorous affirmative action by the United States to assure equality of opportunity, including the setting of "specific goals of minority manpower utilization." To reach the goals, the contractor has had to recruit and to hire minority workmen at a prescribed ratio for each nonminority that would compensate for the effect of past exclusion, e.g., the "Philadelphia Plan" sustained in *Contractors Association of Eastern Pa. v. Secretary of Labor Shultz*, 311 F. Supp. 1002 (E.D. Pa. 1970) *aff'd* 442 F.2d 159 (3rd Cir. 1971) *cert. den.* 404 U.S. 854 (1971); the "Ogilvie Plan" for Madison & St. Clair Counties, Illinois, *Southern Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971) *aff'd* 471 F.2d 680 (7th Cir. 1972); the "Boston Plan," *Associated General Contractors v. Altshuler*, 5 FEP Cases 1105 (D. Mass. 1973); *cf, Weiner v. Cuyahoga Community College*, 238 N.E.2d 839, 844 (1968) *aff'd* 249 N.E.2d 907 *cert. denied* 396 U.S. 1004 (1970); *Trustee of Tufts College v. Volpe Const. Co.*, 358 Mass. 331, 264 N.E.2d 676 (1970); *Northeast Construction Co. v. Romney*, 5 EPD 8495 (C.A. D.C. 1973).

Such affirmative action programs received Congressional approval by the Equal Employment Opportunity Act of 1972 (Public Law 92-261; 86 Stat. 103). In the House Committee Report, the Congress documented the underrepresentation of minorities in supervisory or skilled occupations (such as the census classifications of professional-technician, managers, clerical, sales and craftsmen), in state and local governmental positions, and in higher level and policy-making positions of the federal government,

expressed its impatience at the rate of progress, and fashioned a legislative remedy, 2 U.S. Congressional & Administrative News 1972, 2137 at 2140, 2153, and 2158. The Act, among other provisions, in Section 2 redefined; "person" and "employer" to include state and local government; in Section 13 made reference to and thereby granted recognition of affirmative action plans in employment; and in Sections 4 through 7 extended the powers and jurisdiction of the Equal Employment Opportunity Commission.

Inequality of opportunity caused by discrimination or the perpetuation of its legacy warrants corrective employment practices, e.g., *U.S. v. Wood, Wire & Metal Lathers Etc. Union, Local No. 46*, 471 F.2d 408 (2nd Cir. 1973) *cert. den.* 37 L. Ed. 2d 398 (1973); *Commonwealth v. O'Neill*, 348 F. Supp. 1084 *aff'd* 473 F.2d 1029 (3rd Cir. 1973). A marked racial imbalance in an employer's work force creates or corroborates an inference of restrictive or exclusionary practices, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973), *Harper v. Mayor Etc. of Baltimore*, 359 F. Supp. 1187, 1193 (D. Md. 1972), *Erie Human Relations Comm. v. Tullio*, 6 FEP Cases 733 (W.D. Pa. 1973). When statistics establish an imbalance, action may be taken to secure greater integration of the work force although the existence of reasonable cause for finding discrimination may be denied, e.g., *National Organization for Women v. Bank of California*, 6 EPD 8867 (N.D. Cal. 1973) (consent decree). *Cf.* EEOC Regulations 29 CFR § 1607.13; 41 CFR 60 part 60-3 § 60-3.13.

The constitutional foundation underlying affirmative action plans was aptly explained by the District Court in *Contractors Association etc. v. Shultz*, 311 F. Supp. 1002 at 1010 (E.D. Pa. 1970):

". . . It is equally clear that if this plan is properly

> administered it will be a plan of inclusion rather than exclusion. . . . The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights are not only equal but a must, and when realized will bring into full play that protection to which our Constitution and statutes are dedicated."

This reasoning likewise applies with apprenticeship programs and on-the-job training, *U.S. v. IBEW Local 212*, 472 F.2d 634 (6th Cir. 1973), *U.S. v. Ironworkers (BSOIW), Local 10*, 6 EPD ¶ 8735 (5th Cir. 1973), and to public participation in other activities, including higher education, that provide training for careers or to perform social services.

II. Affirmative Action Programs Neutralize Testing Disparity

The University's Affirmative Action Program in this case, provided a counterweight to offset racial disparities that might have resulted from an across-the-board application of the law school grade prediction formula or other academic criteria, such as grade point averages or law school admission test scores.[2] In its testing for undergraduate admission, the University had found that denial of equivalent educational opportunities and socio-economic deprivations had rendered the "conventional accreditation system"

2. Finding of Fact XXI states 6 minority applicants (excluding Oriental-Americans) had a predicted first year average at 76.23 or above (A 52; Tr. 13). The University's Proposed Finding VIII states "There were in all 70 applicants from minority races. . . ."293 applicants were accepted for admission (Tr. 38). 297 applicants had predicted first year averages of 76.20 or above (A 34; Tr. 44). Therefore, if acceptances for admission were determined by ranking of predicted first year averages, no more than six minorities would have been admitted—a maximum ratio of 1 in 12 of the minority applicants while 1 in 5 of the others would have been accepted.

an inadequate indicator of the full qualifications of certain minorities (St. 233-234). Several years of undergraduate schooling and special preparatory programs probably diminish the disparity. However, intense competition due to the large number of applicants could make a small disparity decisive, *cf. Fowler v. Schwarzwalder*, 348 F. Supp. 844, 846 (D.C. Minn. 1972), 351 F. Supp. 721 (1972) (73% of the Blacks taking a St. Paul Merit Examination passed but none scored high enough for hiring). A program for minority admission to professional schools acts as a precaution to avert or to alleviate any discriminatory effect from the examination and screening process.

In *Minority Access to College*, p. 58 (Schocken Books, N.Y. 1971), a Ford Foundation Report, Dean Fred E. Crossland, former Dean of Admission of New York University, found that most minorities (except Oriental-Americans) generally score lower on conventional written tests than the remainder of the population:

> "Virtually every test that purports to measure educational aptitude or achievement reveals that the mean of the scores of minority youth is about *one standard deviation* below the mean of the scores of the rest of the population. This disturbing observation has been examined and re-examined in test after test, and it appears to be consistent."

The "standard deviation" is a mathematical measure of dispersion of individual units within a normal population and defines the range in which a proportionate number of cases will fall in a normal population.

If the mean of the scores of minorities (except Oriental-Americans) taking an examination falls one standard deviation below the rest of the population, neutral application

of test results would cause a large under-representation of those minorities in the upper groupings. This table illustrates this fact. For simplicity in comparison, it assumes that minorities comprise ten percent of the applicants.[3] Column 1 sets out the top percentile of all applicants that will qualify as candidates for an interview or for the job; Column 2 shows the percentage of all the minority applicants that will reach the top candidate status; Column 3 shows the percentage of all the other applicants that will make the coveted candidate status; Column 4 shows the representation of minorities as a percentage of the top group.

(Col. 1) Top Percentile Selected	(Col. 2) % of minority applicants that make top group	(Col. 3) % of other applicants that make top group	(Col. 4) minority representation in top group as %
10% (top tenth)	1.5%	10.9%	1.50%
25% (top ¼)	6.0	27.1	2.40
33⅓ (top third)	9.5	36.0	2.84
50% (top half)	18.5	53.5	3.70
66⅔ (top two-thirds)	31.5	70.6	4.72
total group (no test or all pass)	100.0%	100.0%	10.00%

As an example, assume these facts: 400 persons take a conventional examination; 40 are minority other than Oriental-American; the applicants are a typical cross-section of the population; and the limited number of positions permits selection of only the top 25%. If 40 were selected, only 1 would ordinarily be a minority person.

A minority mean one-half standard deviation below the

3. The University's Proposed Findings states 1601 completed applications for admission were received, of which, 70 were from minorities (Findings of Fact IV and VIII, Tr. 25 and 29, A 27)—a ratio of 4.37%, rather than 10%. The figures in the Findings, while sparse, tend to show the mean of the scores of the minority applicants within one-half standard deviation below the rest of the population.

rest of the population causes a similar, but less severe, result, as shown in the following table:

(Col. 1) Top Percentile Selected	(Col. 2) % of minority applicants that make top group	(Col. 3) % of other applicants that make top group	(Col. 4) minority representation in top group as %
10% (top tenth)	4.0%	10.7%	3.98%
25% (top ¼)	13.0	26.4	4.57
33⅓ (top third)	19.0	34.9	5.70
50% (top half)	32.0	52.0	6.83
66⅔ (top two-thirds)	50.0	68.6	7.49
total group (no test or all pass)	100.0%	100.0%	10.00%

Insofar as the disparity reflects denial of social, economic and educational opportunities to minorities, mechanical application of the test scores would fall short of measuring personal ability, *cf. Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D. N.M. 1973).

In an employment setting, tests that disproportionately exclude disadvantaged minorities may be used only if a "reasonably necessary connection" were shown between the qualities tested and the position or job to be performed. The United States Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) found that Duke Power Co., a North Carolina utility, had violated the Civil Rights Act of 1964 by its job qualification standards and testing procedure. Although neutrally applied, the tests unnecessarily screened out Blacks at a disproportionate rate—a consequence "directly traceable to race" because Blacks had long received an inferior education in North Carolina's segregated schools, 401 U.S. at 430. The Supreme Court's opinion regards the test results, taken as a group and broken down along racial lines, as a primary indication of discrimination, and uses the job placement rate as the main

measure of compliance with the Civil Rights Act of 1964 unless the employer can prove a business necessity for using factors that exclude minorities:

> "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negoes cannot be shown to be related to job performance, the practice is prohibited." (401 U.S. at 431)
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> • • •
>
> "The Company's lack of discriminatory intent is suggested by special effort to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."

The decision cited Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 CFR § 1607 (35 Fed. Reg. 12333, Aug. 1, 1970), 401 U.S. at 433 as expressing the will of Congress, 401 U.S. at 434.

The EEOC Guidelines forbid regular use of a "test" that "adversely" affects the "opportunities of minority persons or women for hire, transfer, promotion, training, or retention unless validated" according to its regulations, i.e. the racial disparity is inevitable in selecting capable people for the position, 29 CFR XIV § 1607; 41 CFR 60, part 60-3 § 60-3.3. "Test" is defined broadly to embrace all formal systems of rating an applicant's ability, background or experience, ibid. § 1607.2; § 60-3.2. Wherever feasible, examination results are to be broken down by racial groupings,

ibid. § 1607.4(a); § 60-3.4. If a greater ratio of minorities are rejected for reasons unrelated to performance-on-the-job, the test may either be used only with the majority group, or a dual system of scoring must be adopted, ibid. § 1607.5(a)(5); § 60-3.5(a)(5), *cf. Henderson v. First National Bank*, 6 EPD ¶ 8866, p. 5665, 5668 (D.C. Ala. 1973), where the Blacks hired had lower average test scores than whites employed.

A disproportionate failure rate among minorities on employment tests, and/or a racial imbalance among the employees hired, establish a *prima facie* case of violation of the Civil Rights Act with the employer, including government agencies, obliged to produce a valid explanation based on business necessity, 41 CFR 60, part 60-3 § 60-3.13, 3.14; unsatisfactory explanations have led to corrective affirmative action plans that are addressed both to overcoming the testing disparity and to correcting racial imbalance, e.g.

Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (Minneapolis Firemen tests)

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (Police eligibility test)

Western Addition Community Association v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971), 340 F. Supp. 1351 (N.D. Cal. 1972) and 6 FEP Cases 85 (N.D. Cal. 1973) (San Francisco Firemen tests)

Shield Club v. City of Cleveland, 5 EPD ¶ 8406 (N.D. Ohio 1972) (Cleveland Policemen selection)

Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 5 EPD ¶ 8502, 354 F. Supp. 778 (D. Conn. 1973), 6 EPD ¶ 8755 (2nd Cir. 1973) (eligibility examinations for patrolmen)

Smith v. City of East Cleveland, 6 EPD ¶ 8831 (N.D. Ohio 1973) (Examination for policeman)

The Vulcan Society of New York Fire Department v. Civil Service Commission, 360 F. Supp. 1265 (S.D. N.Y. 1973) (Fire Department eligibility examination)

Arnold v. Ballard, 5 EPD ¶ 8630, 6 EPD ¶ 8675 (N.D. Ohio 1973) (Akron Fire Department tests)

"A procedure may appear on its face to be fair and neutral, but if in its application a discriminatory result ensues, the procedure may be constitutionally impermissible." *Penn v. Stumpf*, 308 F. Supp. 1238, 1244 (N.D. Cal. 1970) (setting aside entrance tests for police officer in Oakland). See also, the House Committee Report on the Equal Employment Opportunity Act of 1972, 2 *U.S. Congressional and Administrative News 1972*, at 2156.

College admission tests and grade prediction scores are at best abstracts of personal ability. Qualities, such as judgment, understanding the problems of others, or the ability to deal with people, are difficult to measure by pencil-and-paper testing. This fact was cited, among others, by federal district courts in enjoining school boards from mechanically applying scores from professionally developed tests in selecting teachers and education executives where disparate racial results would ensue, *Chance v. Board of Education et al.*, 330 F. Supp. 203 at 217 (S.D. N.Y. 1971) *aff'd* 458 F.2d 1167 (2nd Cir. 1972); *Baker v. Columbus School District*, 329 F. Supp. 706 (N.D. Miss. 1971) *aff'd* 462 F.2d 1112 (5th Cir. 1972), *cf. Porcelli v. Titus*, 302 F. Supp. 726 (1969) *aff'd* 431 F.2d 1254 (3rd Cir. 1970) *cert. den.* 402 U.S. 944 (1971). Cf. *U.S. v. Nansemond City School Board*, 5 FEP Cases 657 (E.D. Va. 1972) (exclusive reliance on test scores in layoffs enjoined). If

similar reasoning be applicable to legal training an explanation akin to "business necessity" has a diminished utility for excusing a disproportionate racial exclusion. Corrective consideration for minority applicants to neutralize an anticipated disparity adhering in the examination process restores an over-all equality of opportunity for everyone in the entire admission process, and complies with the spirit of the Civil Rights Act of 1964.

III. Affirmative Action Programs Individualize Test Scores

Experience teaches that testing is more an art than a science; that test scores, while a useful tool, are all-too-often rough measures of skills or ability; and that ranking candidates by test scores alone presumes a precision in measurement that is often elusive and usually delusive when applicants come from disparate backgrounds. Washington courts have long recognized the infirmities in paper-and-pencil testing, e.g., *State ex rel. Raines v. Seattle,* 134 Wash. 360, 375, 235 P. 968 (1925).

In the *DeFunis* case, the Supreme Court of Washington recognized that ranking applicants for law school by predicted first year scores would be fundamentally unfair to minority applicants:

> "Policies for admission of minorities throughout the university recognized that the conventional 'mechanical' credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the university." (82 Wn.2d at 20; 507 P.2d at 1175).

The U.S. Supreme Court took note of the same unfairness in an employment context in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973);

> ". . . It [*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)] dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."

Seen in this light, the University's Affirmative Action plan furthered individual justice.

Disadvantaged minorities in the United States have and do live under the disabilities and consequences of racial discrimination, past and present. A member of a minority passing and reaching an approximate score with competitors has very probably overcome social and economic handicaps that the others did not face. "Colorblind" testing procedures disguise a minority individual's relative accomplishments and cloak the very real promise shown by his achievement. An appointing authority that considers and treats each applicant as an individual, understanding and allowing for the degradation of racial discrimination with minorities, promotes equal opportunity, rather than denies it.

CONCLUSION

The Fourteenth Amendment expanded and enshrined in the United States Constitution the truth the Declaration of Independence deemed self-evident: "All men are created equal. . . ." The Congress, the President, and the Supreme

Court of the United States have each determined that the principle "equal *protection* of the laws" authorizes more profund governmental action in racial matters than neutral *application* of codes and common law; it sanctions affirmative action to effect equality of opportunity, in both form and fact, for persons disadvantaged by racial discrimination.

The City of Seattle therefore respectfully requests that the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

JURISDICTION

This matter is before this Court by reason of an order entered by this Court on November 19, 1973, dismissing the appeal of the petitioners from a decision of the Supreme Court of Washington, reported in 82 Wn.2d 11, 507 P.2d 1169 (1973), but granting their alternative petition for certiorari in accordance with 28 U.S.C § 1257(3).

Prior to granting its writ of certiorari, at the Court's invitation, the parties submitted briefs on the question of mootness. The briefs are attached as Apppendix B. Both parties agreed that the case was not moot but it was stated and has been

understood that regardless of the outcome of this litigation Mr. DeFunis will graduate with his class in June, 1974.

QUESTION PRESENTED

Is race a factor which the Law School of the University of Washington, a state university, may constitutionally take into account, as one element in selecting from among qualified applicants those students who will be accepted for admission, in pursuit of a state policy to mitigate gross under-representation of certain minorities in the Law School and in the membership of the Bar?

Respondents submit that this is the only question which is properly before the court in this case.[1] If it is answered in the negative, and contrary to the position of the respondents, the affirmative action programs of the University of Washington and its Law School, like similar programs at many other state institutions, are at an end.[2]

---

1. Petitioners' Question A confusingly describes the Law School's admission program as "giving preference *solely on the basis of race.*" (Their emphasis. Pet. Br. 3.) Minority race is a factor considered, but the Law School has never admitted or enrolled any student "solely on the basis" of any race.

Petitioners' Question B, alleging violation of the Civil Rights Act, has no basis in the record or in fact, and was not an issue in the trial court or in the Washington State Supreme Court. (Pet. Br. p. 3.)

Amici which treat the question in terms of "quotas" either failed to study the record in this case or chose to use this case to argue an issue which this case does not present.

2. Although the trial court expressly held that all claims of the petitioners, other than the equal protection claim, were "without merit" (App. 57), and petitioners do not explicitly raise them here, nor were they raised in the Washington Supreme Court, nevertheless, the decision of the majority of the Supreme Court was attacked in the dissent. There is appended to this brief an identification of the errors in the dissenting

STATEMENT OF THE CASE

The Supreme Court of the State of Washington has adequately stated the facts in the majority opinion written by then Justice Neill.[3] We set them forth here as a part of respondents' Statement of the Case:[4]

"Law school admissions pose a complex problem, and require a sensitive balancing of diverse factors. To gain insight into the complicated process of selecting first-year law students, and to better appreciate the essence of plaintiff's complaint against the law school, we turn first to the circumstances and operative facts—as delineated by the record—from which this litigation arises.

"Under RCW 28B.20.130(3), the Board of Regents of the University of Washington has the power and duty to establish entrance requirements for students seeking admission to the University. The dean and faculty of the law school, pursuant to the authority delegated to them by the Board of Regents and the President of the University, have established a Committee on Admissions and Readmissions to determine who shall be admitted to the law school. For the academic year September 15, 1970, to June 15, 1971, the committee was composed of five faculty members and two student members; on June 7, 1971, the faculty of the law school expanded the membership of the committee to six faculty members and

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opinion of Chief Justice Hale of the Washington Supreme Court. (Appendix A.)

3. The decision was 7 to 2 including the author of the majority opinion who had resigned from the Washington Supreme Court and taken his seat on the United States District Court for the Eastern District of Washington at the time the decision was announced.

4. The footnotes in the following quotation are the Washington Court's footnotes renumbered, except for our bracketed additions.

three student members. The chairman estimated that the committee spent over 1,300 hours in the selection process for the 1971-72 first-year class.

"The number of qualified applicants to the law school has increased dramatically in recent years. In 1967, the law school received 618 applications; in 1968, 704; in 1969, 860; and in 1970, 1026 applications were received. The law school received 1601 applications for admission to the first-year class beginning September, 1971. Under the University's enrollment limitation there were only 445 positions allotted to the law school, and of these the number available for the first-year class was between 145 and 150. The chairman of the admissions committee stated that most of these applicants would be regarded as qualified by admissions standards at this and other comparable law schools in recent years. Hence, the task of selection is difficult, time-consuming and requires the exercise of careful and informed discretion, based on the evidence appearing in the application files. While many applicants are relatively easy to select for admission because of very outstanding qualifications, and others are relatively easy to reject, the middle group of candidates is much more difficult to assess. Plaintiff was in this latter category.

"Applicants for admission to the law school must have earned an undergraduate degree and taken the Law School Admission Test (LSAT) administered by the Educational Testing Service of Princeton, New Jersey. They must also submit with their written application a copy of transcripts from all schools and colleges which they have attended prior to application for admission, together with statements from their undergraduate dean of students and letters of recommendation from faculty members in their major field of study. They

may submit additional letters of recommendation and statements. The application for admission gives the applicant the option to indicate his 'dominant' ethnic origin. The admissions process does not include personal interviews and does not reveal whether applicants are poor or affluent.

"The committee's basic criteria for selecting students are expressed in the 'Guide for Applicants,' a copy of which plaintiff received with his 1971 application:

> 'We below describe the process we applied to determine the class that entered the University of Washington School of Law in September 1970. We anticipate that the same process will be applied in determining membership in the class of 1971.
>
> . . .
>
> 'In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.' [St. 407, Exh. 45.]

"For the purpose of a preliminary ranking of the applicants for the class of 1974, the junior-senior undergraduate grade point average and the Law School Admissions Test scores[5] for each applicant were combined through a formula to yield a predicted first-year of law school grade average for the applicant. This preliminary index number is called the Predicted First-Year Average (PFYA). The relative weight of grades and test scores in this formula was determined on the basis of past experience at the law school. The same formula is used for all applicants in a given year. If an applicant has taken the LSAT more than once in the past 3 years, the average score

---

5. The Law School Admissions Test yields two scores for each candidate, a general law aptitude score and a writing ability score.

is employed rather than the latest score; this is done to offset a learning effect which statistical studies by the Educational Testing Service indicate occcurs as the result of the multiple taking of the test.

"Plaintiff's PFYA, as determined by the law school, was 76.23. This figure was calculated by using a formula combining plaintiff's junior-senior grade point average of 3.71, average LSAT score of 582 (512 plus 566 plus 668, divided by 3)[6] and average writing test score component of 61 (62 plus 58 plus 64, divided by 3).

"Ranking of applicants by PFYA was used to help organize the committee's processing of the applications. On the basis of the previous year's applicant group, the committee decided that most promising applicants for the class of 1974 would be defined as applicants with predicted first-year law school averages over 77. Applicants with PFYAs above 77 were reviewed and decided by the full committee as they came in, in order to reach an early decision as to the acceptance of such students. Each of these files was assigned to a committee member for thorough review and for presentation to the committee.

"Applicants with PFYAs below 74.5 were reviewed by the chairman of the committee, and were either rejected by him, or placed in a group for later review by the full committee. The decision of rejection or committee review of an application was based on the chairman's judgment derived from information in the applicant's file indicating whether the applicant had a significantly better potential for law study than

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6. Plaintiff took the Law School Admissions test on three different occasions: August 1969, November 1969 and December 1970.

the relatively low predicted first-year average tended to indicate. Cases of doubt were to be resolved in favor of deferring judgment until committee review could be undertaken.

"Two exceptions were made in regard to applicants with PFYAs below 74.5. First, the law school had established a policy that persons who had been previously admitted but who were unable to enter, or forced to withdraw from, the law school because of induction into the military service, had a right to reenroll if they reapplied immediately upon honorable completion of their tour of duty. Second, all files of 'minority' applicants (which the committee defined for this purpose as including Black Americans, Chicano Americans, American Indians and Philippine Americans[7]) were considered by the full committee as warranting their attention, regardless of the PFYA of the individual applicant.

"Applicants with predicted first-year averages between 74.5 and 76.99 were accumulated and held until the applications deadline had passed and essentially all the applications were complete and ready for review, so that the critical decisions as to the remainder of the incoming class could be made with a relatively complete view of qualified applicants not therebefore admitted. Plaintiff's application, presenting a 76.23 predicted first-year average, was placed in this third category. Included for consideration at that time, in addition to the minority group and those with PFYAs between 74.5 and 77,

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7. The chairman of the admissions committee testified that Asian-Americans, *e.g.*, were not treated as "minority" applicants for admissions purposes, since a significant number could be admitted on the same basis as general applicants. [See further discussion of this matter, *infra* p. 44.]

As used herein, the term "minority" refers to and includes only Black Americans, Chicano Americans, American Indians and Philippine Americans.

were some applicants with PFYAs above 77 upon whom the committee had reserved judgment, feeling that such applicants were not as promising as their PFYAs seemed to indicate.

"These 'close cases,'—*i.e.*, where the applicant was neither clearly outstanding nor clearly deficient—required the most effort of the committee. In selecting the applicants from this narrow range, the committee used the process described in its Guide for Applicants, a copy of which was sent to all applicants:

> 'We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.
>
> 'An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.
>
> 'We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.' [St. 407, Exh. 45.]

"Each file to be reviewed by the full committee was first assigned and read by a committee member who reported on its contents to the committee. There followed a discussion on the applicants under consideration, leading to a committee vote on the disposition of the application. Assignment of files

to the committee member for initial reading was usually on a random basis. The files of Black applicants, however, were assigned to and separately read by both Professor Geoffrey Crooks and Mr. Vincent Hayes, the two committee members thought best equipped to report to the full committee on the contents of the file. Professor Crooks worked with minority applications during the summer of 1970 as director of the school's Council on Legal Education Opportunities (CLEO) program[8] and Mr. Hayes, a second-year Black law student, who previously served as director of the Governor's Multi-Service Center in Seattle, a job involving considerable personnel evaluation. Applications of Chicanos, American Indians and Filipinos were reviewed by Associate Dean Robert S. Hunt for presentation to the committee.

"In considering minority applicants, the committee was guided by a University-wide policy which sought to eliminate the continued effects of past segregation and discrimination against Blacks, Chicanos, American Indians and other disadvantaged racial and ethnic minority groups. At trial, the President of the University of Washington testified as to the origin of this policy:

> 'More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges in the University and the University of

8. A federally (OEO) funded program, sponsored by the American Bar Association, the American Association of Law Schools, the National Bar Association and the Law School Admission Council, which provides summer training programs and financial assistance to disadvantaged college students seeking admission to law school.

Washington, in particular, given the racial distribution of this state.

. . .

'So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.' [A fuller text of President Odegaard's testimony is set forth at pp. 39-40 *infra*, n.26.]

"Thus, the University sought to achieve a reasonable representation within the student body of persons from those groups which have been historically suppressed by encouraging their enrollment within the various programs offered at the University. Policies for admission of minorities throughout the University recognized that the conventional 'mechanical' credentializing system does not always produce good indicators of the full potential of such culturally separated or deprived individuals, and that to rely solely on such formal credentials could well result in unfairly denying to qualified minority persons the chance to pursue the educational opportunities available at the University.

"The law school sought to carry forward this University policy in its admission program, not only to obtain a reasonable representation from minorities within its classes, but to increase participation within the legal profession by persons from racial and ethnic groups which have been historically denied access to the profession and which, consequently, are grossly underrepresented within the legal system. In doing so, the Admissions Committee followed certain procedures which are the crux of plaintiff's claimed denial of equal protection of the laws.

"First, in reviewing the files of minority applicants, the com-

mittee attached less weight to the PFYA in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school. Also, the chairman testified that although the same standard was applied to all applicants (*i.e.*, the relative probability of the individual succeeding in law school), minority applicants were directly compared to one another, but were not compared to applicants outside of the minority group. The committee sought to identify, within the minority category, those persons who had the highest probability of succeeding in law school. Thus, the law school included within its admitted group minority applicants whose PFYAs were lower than those of some other applicants, but whose entire record showed the committee that they were capable of successfully completing the law school program.[9]

"As a result of this process, the committee admitted a group of minority applicants, placed a group of such applicants on a waiting list, and rejected other minority applications. The dean of the law school testified that the law school has no fixed admissions quota for minority students, but that the committee sought a reasonable representation of such groups in the law school. He added that the law school has accepted no unqualified minority applicants, but only those whose records indicated that they were capable of successfully completing the law school program.

"The admissions committee sent letters of acceptance to over 200 applicants. Normal attrition among those invited was expected to reduce this group to produce a class of about 150. Against the possibility of unusually high attrition among the

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9. For example, many of the minority group applicants were first screened through special compensatory summer programs, operated primarily by CLEO. [See text at note 8, *supra*, p. 9.]

group of accepted applicants, the committee placed approximately 155 additional applicants on a waiting list. The waiting list was ranked in approximate quartiles, with 46 applicants in the highest quartile, 38 applicants in the second quartile, 36 applicants in the third quartile, and 33 applicants in the fourth or lowest quartile. The remaining applicants—those receiving neither offers of acceptance nor waiting list assignments—received letters of denial. Plaintiff received an invitation to be placed on the waiting list and he was ranked in the fourth or lowest quartile. On July 21, 1971, the rate of attrition from the admitted applicants appearing to be within normal ranges, the committee decided to send letters of denial to those applicants in the third and fourth quartiles on the waiting list. Plaintiff was thus notified on August 2, 1971, that he was neither admitted nor any longer on the waiting list. As of August 1, 1971, 275 students were admitted to the freshman law school class and 55 students remained on the waiting list, making a total of 330 students.

"Out of the 275 students given notice of admission, 127 were nonresidents of the state of Washington. Out of the 55 on the waiting list, 23 were nonresidents of the state of Washington. Thus, of the 330 applicants admitted or waiting, 180 were residents of the state of Washington. Ultimately, 32 nonresidents (21.6 per cent of the entering class) actually enrolled in the first-year class.

"Because of the judgmental factors in the admissions process, as outlined, the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitation on the basis of other

information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority group students invited 18 actually enrolled in the first-year class.

"The trial court found that some minority applicants with college grades and LSAT scores so low that had they been of the white race their applications would have been summarily denied, were given invitations for admission; that some such students were admitted instead of plaintiff; that since no more than 150 applicants were to be admitted to the law school, the admission of less qualified students resulted in a denial of places to those better qualified; and that plaintiff had better 'qualifications' than many of the students admitted by the committee. The trial court also found that plaintiff was and is fully qualified and capable of satisfactorily attending the law school.

"The trial court concluded that there is no constitutional restriction upon admitting nonresidential students; and no laws or regulations provide preference to residential students over nonresidential students for admission to the University of Washington School of Law; that, in denying plaintiff admission to the law school, the University of Washington discriminated against him and did not accord him equal protection of the laws as guaranteed by the fourteenth amendment to the United States Constitution; and therefore, that plaintiff should be admitted to the law school for the class of 1974, beginning September 22, 1971.[10]" *DeFunis v. Odegaard*, 82 Wn.2d at 14-23. (Juris. St. A-5 to A-14.)

10. At time of oral argument in this court it was stated that plaintiff had actually been admitted to the law school in September, 1971, and was still in attendance. Due to the conditions under which plaintiff was admitted and the great public interest in the continuing issues raised by this appeal, we do not consider the case to be moot.

This statement by the Washington Supreme Court needs to be supplemented in only one respect. Of the minority students offered admission, only one black applicant and *no* Chicano, American-Indian, or Filipino applicants had predicted first-year averages higher than the petitioner, though all were qualified. (App. 38, 39, 40; Jur. St. A-65-66.) Thus, had the admissions committee followed strictly the PFYA in determining which qualified applicant should be admitted, no more than one minority applicant from these groups would have been admitted to the law school class in September, 1971. The inevitable conclusion which one must draw from these figures is that if only the mathematical indicators had been considered, the respondent Law School would have continued to be a "segregated" law school to all intents and purposes, which means it would have been effectively closed to *qualified* Black, Chicano, American-Indian, and Filipino-American applicants.[11]

While Mr. DeFunis contends that he "was denied entry into the University of Washington Law School by reason of his *race*," (Their emphasis. Pet. Br. 9.) the facts of this case simply do not support that conclusion. Rather, they indisputably show that of the 149 persons enrolled in the law school class commencing in September, 1971, all but 18 were of the white race and, of the approximately 330 offered admission,

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11. The minority admissions program at the Law School did not involve a "quota," although there is much discussion in briefs supporting petitioner attacking the idea of racial quotas. These attacks are irrelevant here. The purpose of the law school program was to expand, not restrict, the admission of minorities. Its effect was to increase, not reduce, the number of minority applicants admitted. No applicant was required to identify his racial or ethnic origin. There was no ceiling on minority admissions. Without distorting the conventional meaning of the term, there could not be a "quota" in such a system.

44 were of minority races, and the balance of 286 were of the white race. Since over 1,600 applied for admission, most of whom were qualified, and since there were only 150 places to be filled, whether or not special admissions programs for minorities were undertaken by the Law School and the University, numerous individuals in the same racial class as Mr. DeFunis would have to be denied admission even while the vast majority of those admitted came from his racial class. The most that can be said, therefore, is that while some were admitted and enrolled who, but for their minority race, might not have been admitted, no one was excluded by reason of his or her race, religion, or ethnic origin.

SUMMARY OF ARGUMENT

All law classifies and all law discriminates, but only that law which classifies or discriminates invidiously offends the Equal Protection Clause of the Fourteenth Amendment. The trial judge who ordered the admission to the Law School of the petitioner Marco DeFunis, Jr., did so because he understood *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), to stand for the proposition that the Constitution forbids all consideration of race in a public school admissions policy.

Respondents contend that this is a misreading of the holding in both *Brown I* and *Brown II*. *Brown I* was explicitly clear in its identification of the invidiousness of racial discrimination in that case because it is psychologically harmful to black children. *Brown II* was concerned with the means of remedying that invidious racial discrimination.

There can be no doubt that the Supreme Court of the State

of Washington was correct in its findings that the challenged admissions policy was necessary to effect the compelling interest of that state in increasing minority participation in the legal education offered by its only state-supported law school and in increasing minority participation in the legal profession.

The Constitution has been *color conscious* since 1866 in permitting programs that are designed to correct the effects of slavery and racial discrimination. The purpose and effect of the Law School's program both dispense with the need for the strict scrutiny required where "suspect classification" or state action impinging on "fundamental interests" is concerned.

This Court's unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), said that school authorities may overcome the effects of past racial discrimination even when their school has never been guilty of racial segregation. That opinion also said that school authorities may use a racial classification to achieve an integrated classroom to prepare students for a pluralistic society. Both propositions particularly apply to legal education because it so much depends for its adequacy on association and interchanges among students.

Not only the minority students but all of the students at a law school have the right to expect their legal education to be conducted in integrated classes with students from all racial groups. It is the affirmative duty—certainly within the discretion—of those responsible for admissions to seek such a student body. It would be wholly incongruous to require (on the basis of the Equal Protection Clause) a program like that of which the petitioners complain here in an institution which formerly discriminated, and at the same time forbid the same program as a violation of the Equal Protection Clause at a university

whose record for nondiscrimination is beyond reproach. Most institutions cannot know in which category they belong. They have had occasion to ask, like President Odegaard at the University of Washington, "Where are the black students? Where are the black students?"

The admissions process followed by the University of Washington Law School in 1971 was an orderly technique for dealing with a massive number of law school applications, a method which permitted the use of committee discretion confined by pre-articulated standards, including the consideration of a race in order to produce a student body better reflective of the society as a whole, and safeguarded by the use of the deliberative process. The objective of the respondents' admission process, like that at most law schools in this country, was not only to improve the quality of education for all of the students in attendance but to conduct an admissions program in such a way that the historic under-representation of minority groups in the legal profession and in the law school classroom would be ameliorated rather than exacerbated. This program is to benefit the majority race of which Mr. DeFunis is a member just as much as it is to benefit the minorities specially considered. The interest of the majority race in an integrated society has been repeatedly recognized by this Court in such cases as *Peters v. Kiff*, 407 U.S. 493 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The fact that the Law School did not disguise its program by calling it a program for "culturally deprived" or "economically deprived" members should not disqualify it. The reason race was used as a decisional component was because it was the only precise way to reach the problem addressed, namely racial under-representation.

If the decision below does not stand, every means available to the State of Washington to deal with a critical problem in education, with composition of the legal profession, and with *de facto* segregation in the state's only law school will have been foreclosed. Beyond the State of Washington and beyond the issues of a pluralistic legal education, a reversal of the decision below will endanger all affirmative action programs throughout the nation and across the entire spectrum of activities in which they are employed.

ARGUMENT

I.

CONSIDERATION OF THE RACE OF MINORITY APPLICANTS AS AN AFFIRMATIVE FACTOR IN ADMISSION TO THE LAW SCHOOL DOES NOT OFFEND THE FOURTEENTH AMENDMENT

This case commenced its long march to this Court when the trial judge in the King County Superior Court of the State of Washington ruled that

> "In 1954 the United States Supreme Court in *Brown v. The Board of Education* decided that public education must be equally available to all regardless of race.
>
> After that decision, the Fourteenth Amendment could no longer be stretched to accommodate the needs of any race. Policies of discrimination will inevitably lead to reprisals. In my opinion, the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause." (App. 56-57.)

That a decision by a trial judge in Seattle, Washington, ordering the admission of Mr. DeFunis to the only state-supported law school, should receive such widespread attention as

Judge Shorett's decision in this matter attests to the uniqueness of that decision.[12]

The case remains a challenging exercise because of the multiplicity of theories advanced, but its resolution should not be difficult because whatever theory is pursued, it leads to an affirmance of the result of the court below, *i.e.*, the Equal Protection Clause does not forbid consideration of minority races in achieving ethnic balance in higher education generally and more particularly in legal education.

A. *Since 1866, the Constitution has been "color conscious" to permit ameliorative programs to educate and otherwise benefit minority races.*

When the first Mr. Justice Harlan, dissenting alone in *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896), said,

> Our constitution is color blind, and neither knows nor tolerates classes among citizens,

he went on to predict that the opinion of the other seven justices participating in the majority decision upholding a Louisiana statute which required separate railway carriages "for the white and colored races" would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." 163 U.S. at 559. Jim Crow was sanctified by that decision and, as every school child now knows, the Harlan prediction was correct. In 1954 with the first *Brown v.*

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12. See, *e.g.*, N.Y. Times, Sept. 26, 1971, Section I at 62. It also received widespread law review comments before a decision reversing by the Washington Supreme Court and in the absence of a reported opinion. See, *e.g.*, 21 American U.L. Rev., 736 (Sept., 1972); 49 Chi.-Kent L. Rev., 132 (Spring, 1972); 52 Boston U. L. Rev., 304 (Spring, 1972); 57 A.B.A.J., 1233 (Dec., 1971); *Commentary on the DeFunis Case*, 1 Balsa Reports, Newsletter No. 2, Feb., 1972, at 13; 25 Vand. L. Rev., 234 (Jan., 1972).

Board of Education case, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), this Court corrected the pernicious doctrine of *Plessy v. Ferguson*, by its ruling that "separate but equal" school facilities violated the Equal Protection Clause. But as *Brown II*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), teaches, those cases only *began* the long process of undoing the harm done, not only by the *Plessy v. Ferguson* doctrine, but the centuries of racial discrimination which preceded it.

Those cases, however, do not teach us that for all purposes and under all circumstances is the Constitution color blind. Rather, what *Brown I* and *II* and the cases which have followed them down to this very day tell us is that the Constitution is *color conscious* where procedures and policies are concerned with the correction of the effects of the racial segregation which *Plessy v. Ferguson* sanctioned. See, *e.g.*, *United States v. Jefferson County*, 372 F.2d 836 (5th Cir. 1966), *cert. denied* 389 U.S. 840, 88 S. Ct. 67, 19 L. Ed. 2d 103 (1967); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2nd Cir. 1968); *Contractors Ass'n of Eastern Pa. v. Hodgson*, 442 F.2d 159 (3rd Cir. 1971), *cert. denied* 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed. 2d 95 (1971); *Carter v. Gallagher*, 452 F.2d 351 (8th Cir. 1971), *cert. denied* 406 U.S. 950 (1972); *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied* 402 U.S. 944, 91 S. Ct. 1612, 29 L. Ed. 2d 112 (1971); *Associated General Contractors v. Altshuler*, — F.2d —, 6 F E P Cases 1031 (1st Cir. No. 73-1250, Nov. 30, 1973).

Indeed, the 39th Congress, which proposed the Fourteenth Amendment for ratification by the states, entertained no doubt about the constitutionality and propriety of affirmative measures for the welfare and education of the former slaves. The purpose of the Act to Strengthen the Freedmen's Bureau, en-

acted over President Andrew Johnson's veto the month after proposal of the Fourteenth Amendment, was expressly declared to be enacted in behalf of "loyal refugees and freedmen" to secure to them "the freedom conferred by proclamation of the commander in chief, by emancipation under the laws of states, and by constitutional amendment." Act of July 16, 1866, Section 2, 12 Stat. 174.

Section 6 of the same Act departed from the term "freedmen" and confirmed land grants under instruction in 1863 by President Lincoln to "heads of families of the African race." 12 Stat. 175.

In 1968 this Court affirmed its expressed understanding that the Civil Rights Act of 1866 (42 U.S.C. § 1982) was designed explicitly to benefit the freed slaves when it affirmed the power of Congress to require that "all citizens shall have the same right . . . enjoyed by white citizens" to purchase housing on the authority given by the Thirteenth Amendment to enforce the abolition of slavery. *Jones v. Alfred Mayer Company*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 1189 (1968). The case confirms the power of the state to prohibit the imposition of the badges and incidents of slavery and recognizes the validity of legislation which singles out a race and confers benefits upon it for the purpose of correcting the effects of past injustices. It should be dispositive of this case since the powers that would eradicate vestiges of slavery cannot be "color blind." Slavery itself was not color blind.[13]

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13. See, also, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed. 2d 828 (1966), where a unanimous Court upheld the constitutionality of the Voting Rights Act of 1965 as a proper exercise of congressional authority under § 5 of the Fourteenth Amendment, stating "It was well within Congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement." 384 U.S. at 653.

There are other areas in which the Constitution has been color conscious. For example, the Congress has established the Bureau of Indian Affairs and required that hiring preferences be given to Indian Americans by that Bureau, 25 U.S.C. § 472 (1970), and has enacted legislation governing many aspects of the reservation-Indian's life, including matters of education, health, civil liberties, welfare, transfer of land, validity of contracts, testamentary dispositions and expenditures of tribal funds. See, generally, Title 25 U.S.C., *Indians*.[14]

B. *This Court has never yet held or said that race is a "suspect classification" requiring a compelling state interest in justification when the major purpose and effect is to extend equality to an under-represented minority race.*

The compelling state interest doctrine has its genesis in an unfortunate decision of this Court relating to Japanese-Americans during World War II. *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 195 (1944).[15]

But even in *Korematsu*, where this Court upheld that classification of Japanese-Americans for the purpose of deporting them from their homes "necessary" to fulfill the compelling state interest of waging war successfully, Mr. Justice Black prefaced the Court's opinion with the admonition that

> ". . . [A]ll legal restrictions which *curtail* the civil rights of *a single racial group* are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid

14. There seems little doubt that Indians "can only be defined by their race." *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 [Three-Judge Court, E.D. Wash. (1965), aff'd 384 U.S. 209 (1966)].

15. See Rostow, *The Japanese-American Cases—A Disaster*, 54 Yale L.J. 489 (1945).

> scrutiny. Pressing public necessity may sometimes justify the existence of such *restrictions*; racial antagonism never can." 323 U.S. at 216. (Emphasis supplied.)[16]

Thus, we see that the racial classification is "suspect" when the legislation creating it imposes legal restrictions which curtail the civil rights of those within the racial group.

It is clear that it was such a restriction that Mr. Justice Stone had in mind when he spoke of "discrete and insular minorities" which might call for a "more searching judicial inquiry" in his footnote 4 in *United States v. Carolene Products Company*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).[17] It is clear that it was such a limited concern that was stated by Chief Justice Warren in framing the question in *Brown v. Board of Education*, 347 U.S. 483:

> "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, *deprive* the children of the *minority group* of equal educational opportunities?" 347 U.S. at 493. (Emphasis supplied.)

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16. Mr. Chief Justice Stone had used even stronger language in *Hirabayashi v. United States*, 320 U.S. 80, 100 (1943): "Distinctions between citizens solely because of their race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." The Court, nevertheless, upheld—regrettably—the conviction of a University of Washington student for violation of a statute applicable to him solely because of his race.

17. Mr. Justice Stone observed that in the case under consideration it was not necessary to consider whether the legislation should be subjected to a more exacting judicial scrutiny under the general provisions of the Fourteenth Amendment which might be required were the Court considering "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 152-53, n.4.

In all of the Court's modern rulings dealing with the effects of racial segregation, whether in education or in the use of public facilities, there is implicitly and sometimes explicitly recognized the fact that the racial classifications themselves generate "a feeling of inferiority as to their status in the community" on the part of the minority race. *Brown I*, 347 U.S. at 494. It is racial classifications which have this purpose or effect that are suspect.[18]

The facts before this Court in this case simply do not present the Court with a racial classification which curtails the civil rights of members of a single racial group nor do they present to the Court a need to justify restrictions against a

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18. If the Court still adheres to *Korematsu*, which we doubt, its result could only be justified by some compelling state interest. We also doubt that such racial classifications could ever be justified. See note, Developments—Equal Protection, 82 Harv. L. Rev. 1067, 1089, *et seq.* (1969) where it is observed in part as follows:

> "The results in the cases following *Brown* are explicable, however, without resort to a 'colorblind' principle. *Korematsu* had recognized that statutes which impose a burden on a racial group are immediately suspect and would be upheld only if the state could demonstrate a justification of overriding importance. In *Brown* the Court seems to have recognized for the first time that the system of racial segregation 'is usually interpreted as denoting the inferiority of the negro group' . . . . Given this burden which segregation imposes on a single racial group, the summary opinions in the subsequent segregation cases may indicate that the states not only failed to show a strong justification for the burden, but simply failed to show any justification at all.
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> . . . .
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> It now seems doubtful that any objective short of the exigencies of war-time emergency would justify the imposition of any long-term burdens on a racial basis, especially racial segregation. Indeed, even under crisis conditions, it is not clear that a state would be permitted to impose serious deprivations because of an individual's race. Nevertheless, the rejection of the 'colorblind' interpretation of the equal protection clause will allow the courts more flexibility in appraising measures which have no discriminatory purpose. For example, a state may be permitted to channel compensatory benefits to a racial group whose members have suffered because of prior state discrimination."

single racial group since this case presents no restrictions on the civil rights of any person.[19]

This case does present this Court with an opportunity to correct the misunderstanding evidenced in the petitioners' brief and those of the *amici curiae* supporting the petitioners that racial classifications, regardless of the purpose for which they are created, must always be treated as "suspect," and must always be justified by showing their necessity for some compelling state interest. Mr. Justice Marshall only recently objected once more to what he called the Court's "rigidified approach to equal protection issues." (Marshall, J., dissenting

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19. There is a dangerous suggestion in the briefs of some *amici* supporting petitioners that minority admissions programs are invidious in that they generate feelings of inferiority among minority students and create a "stigma" with respect to minority lawyers. The argument could be dismissed as frivolous inasmuch as minority students and lawyers themselves are strongly in support of minority admissions programs. (See the *amicus* briefs in support of respondents filed by the National Conference of Black Lawyers, the Mexican Defense and Educational Fund, American Indian Law Students Association, etc.) It will be time to worry about "stigma" when those allegedly stigmatized have become sufficiently concerned to call for abolition of minority programs.

But dismissing the argument as patronizing does not give it its due, for the argument about "stigma" is self-fulfilling and dangerous. Its constant repetition helps generate a belief that academic standards at law schools are less rigorous for minority students, and that bar examiners are more indulgent in evaluating the qualifications of minority applicants to the Bar. Neither of these beliefs is true. Neither is supported by anything in the record before this Court. The continuing unsupported repetition is itself a source from which some "stigma" could arise. What is true is that all law students face some degree of risk of academic failure. It is also true that academic attrition among those with higher degrees of statistical risk is likely to be higher. But for those who succeed in graduating and who pass bar examinations, the degree of initial statistical risk becomes irrelevant. Certainly it has never been the practice to deprecate the quality of white lawyers who have succeeded in law school and in bar examinations on the grounds that there was some degree of risk initially that they would not be able to accomplish those goals. It is unconscionable to treat minority lawyers on any other basis. For all students, accomplishments of this order should be celebrated for what they are, not deprecated by reference to prior statistical speculations about what they might have been.

in *Marshall v. United States*, — U.S. —— [No. 72-5881, January 9, 1974].) Whether it has followed a "rigidified approach" or not, this Court has never yet suggested that racial classifications used to overcome the effects of past racial discrimination, or used to educate for a pluralistic multi-racial society, must sustain the heavy burden called for by the "suspect category" concept.[20]

In 1967 four distinguished professors of constitutional law published a casebook which says:

> "The highest court of no state and the court of appeals in no federal circuit, however, has yet applied the Harlan ['color-blind constitution'] metaphor to strike down a local effort to reduce racial imbalance in the schools. The far more troublesome questions are related to . . . what affirmative action the constitution may require the school authorities to take to reduce an existing imbalance." 2 FREUND, SUTHERLAND, HOWE, BROWN, CONSTITUTIONAL LAW, CASES AND OTHER PROBLEMS, 1140 (1967).

Annual supplements have reported no change. This Court's decision, if the Washington Supreme Court were reversed, would be new and unique, as well as unfortunate.[21]

C. *Whether or not race is now a "suspect classification" whatever the purpose of its use, a compelling state inter-*

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20. That strict scrutiny should not be applied to the racial classification in this case is the conclusion reached in Comment, *Ameliorative Racial Classifications Under the Equal Protection Clause:* DeFunis v. Odegaard, 1973 DUKE L.J. 1126. Another doctrinal analysis might be suggested by Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

21. The possibilities of discrimination against a Caucasian majority by state institutions have always been so remote that it has never been a problem considered worthy of attention. See, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 22, (1948) where this Court observed that it had been cited no case in which a court, state or federal, "had been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color."

est justifies the minority preference in the Law School's admissions program.

Mr. DeFunis never contended in the court below that race is a suspect classification when discrimination is benign, favoring a minority race, and we do not now concede that we must sustain a strict scrutiny burden by showing "a compelling state interest." The Washington Supreme Court's holding appears to be unique in imposing that burden in a case involving racial classifications favoring "discrete and insular" minorities.

But the Washington Supreme Court was correct when it held that the consideration of the race of applicants in determining admissions to the state's Law School was necessary to the accomplishment of a compelling state interest and finding, *inter alia*, that

> "The state has an over-riding interest in promoting integration of public education. In light of the serious under-representation of minority groups in the law schools, and considering that minority groups participate on an equal basis in the tax support of the law school, we find the state interest in eliminating racial imbalance within public legal education to be compelling." 82 Wn.2d at 33. (Juris. St. A-24.)[22]

Recalling the language of this Court in *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), the Washington court found that the state has an over-riding interest in providing *all* law students with a legal education that will adequately prepare them to deal with the societal problems which will confront them upon graduation. It recognized the critical role the legal profession plays in the policy-making

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22. The gross under-representation of minority lawyers in the profession nationally is also acute in the State of Washington. See Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069. For example, a recent study for the National Bar Association by the Honorable Edward B. Toles, Referee in Bankruptcy in the U.S. District Court (N.D., Ill.)

sector of our society and, to properly prepare lawyers, the educational interests of the state in producing a racially-balanced student body at the Law School was found to be compelling. 82 Wn.2d at 35 (Juris. St. A-25-A-26.) As the court below concluded,

> "The consideration of race in the law school admissions policy meets the test of necessity here because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived." 82 Wn.2d at 35 (Juris. St. A-26.)

In short, the lower court found that the state had two compelling interests: one in the adequacy of its educational process and one in the adequacy of its legal profession. In this latter respect, minority admissions programs have among their objectives that minority representation can be increased among judges, law teachers, prosecutors, hearing examiners, staff counselors, and other law-trained government officials; that a fair representation of minority group members has the kind of access to elective office legal education has always provided; that minority communities can have the kind of leadership law-trained persons have historically furnished; and that young people of minority status have the kind of models for building career aspirations in law which is the only long range solution to the problem.

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and Chairman of the NBA's Committee on the Judiciary, showed that in the State of Washington there was one white lawyer for every 720 whites in the state, and one black lawyer for every 2,436 blacks in the state. (The Toles' report is reprinted in the Congressional Record for September 2, 1970, p. 30786.) See also McPherson, *The Black Law Student*, THE ATLANTIC 93 (April 1970) at p. 93 where he finds ". . . that there is one lawyer for every 637 persons in the United States, but only one black lawyer for every 7,000 black persons."

While respondents have never supposed that they are required to justify the affirmative consideration of race in their admissions policy by showing that it is necessary to fulfill a compelling state interest, they do maintain that if such a justification is required, the conclusion reached by the Supreme Court of the State of Washington should be accorded special respect. This case involves legal education in a state in which its Supreme Court exercises responsibility for an integrated Bar (Rev. Code of Wash., Ch. 2.48), has special concerns with the character and composition of that Bar, and is particularly knowledgeable in both an official and personal sense with legal education in the state. There could be no more authoritative assessment than that made by the Washington State Supreme Court of the compelling nature of the state interest or of the impossibility of achieving ethnic balance by any other means.

Respondents further urge that the interest has been recognized as compelling not only in the State of Washington but in the nation as a whole, both as it respects educational values (see, *e.g.*, *amicus* brief of the American Association of Law Schools) and as it affects professional objectives (see, *e.g.*, *amicus* brief of the American Bar Association). A practice like that at the University of Washington's Law School is virtually universal among accredited law schools in this country. (See *infra* pp. 48-49.)

Moreover, the federal government has recognized the necessity of affirmative action programs to correct the effects of past discrimination and has required its contractors, including the University of Washington, to adopt affirmative action programs to assure employment of significantly larger numbers

of minorities and women, programs which, by their terms, require consideration of race by these public agencies.[23]

In its enforcement of Title VI of the Civil Rights Act of 1964, (78 Stat. 252, 42 U.S.C. §§ 2000d *et seq.*), which prohibits discrimination on the grounds of race, color or national origin in federally-assisted programs, the Department of Health, Education and Welfare, Office of Civil Rights, has promulgated rules and regulations requiring recipient institutions which have "previously discriminated against persons on the grounds of race, color or national origin" to take affirmative action to overcome the effects of past discrimination. Those same regu-

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23. Executive Order No. 11,246, as amended, 3 CFR 173 (1973 Supp.) requires federal contractors not to discriminate against employees or applicants for employment because of race, color, religion, sex or national origin and to ". . . take affirmative action to insure that applicants are employed and that employees are treated during employment" without regard to these factors. As the publication of the Office of Civil Rights of the Department of Health, Education and Welfare, *Higher Education Guidelines, Executive Order 11246* (October 1, 1972), states it at p. 3:

> "Affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the Executive Order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the *status quo ante* indefinitely."

The U.S. Department of Labor's Office of Federal Contract Compliance has adopted complex rules requiring federal contractors, such as the University of Washington, to "determine whether women and minorities are 'underutilized' in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables to overcome that underutilization." "Underutilization" is defined in the regulations as "having fewer women or minorities in a particular job than would reasonably be expected by their availability." See 36 *Fed. Reg.* No. 234, Dec. 4, 1971, and Chapter 60 of Title 41 C.F.R., Part 60–2.

Must not the respondent University (and all colleges and universities) give special consideration to the race and sex of applicants to its limited student places if it is to increase the "availability" of minorities and women for the employment opportunities it offers?

lations *permit* recipient institutions that have never discriminated to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin." 45 C.F.R., Part 80, § 80.3(b)(6); 38 *Fed. Reg.* 17979, 1973. These statutes and regulations apply to "any programs or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

The respondent University of Washington is a recipient institution covered by these H.E.W. regulations which has never had a policy of discrimination on the basis of race, color or national origin. Its admission program here being challenged is precisely the affirmative action program permitted by the above-cited regulation. Can it seriously be argued at this time in the history of our country that such a program is not necessary to serve the compelling *national* interest in alleviating the effects of over 300 years of racial discrimination practiced and sanctioned with the force of law in this nation?

D. *The minority admissions program is constitutional under any test of scrutiny—strict, rational, or intermediate—because its purpose and effect are to improve the education, the Bar, and the Bar's service to the public, including the members of majority as well as minority races.*

The absence of a purpose to discriminate against a minority race does not, of course, constitutionally justify a purposeless or irrational discriminatory effect. There is good authority, however, that if the dominant purpose and effect of the program are neither irrational nor invidious, the Court will dispense with the strict scrutiny attendant on suspect classification or state action impinging on fundamental interests, even if those interests are incidentally affected.

Mr. Chief Justice Warren, in *McGowan v. Maryland*, 366

U.S. 420 at 427, 81 S. Ct. 1101 at 1105, 6 L. Ed. 2d 393 (1961), stated the general rule as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. [Citing cases.]"

The Court there was concerned with whether or not Maryland's Sunday closing law was a violation of the Equal Protection clause of the Fourteenth Amendment and found that, notwithstanding certain exemptions in the Maryland law allowing certain types of activity, the results of such statutory distinctions were not "invidious" or "unreasonable," and thus did not violate the Equal Protection clause.

It was only when asked to determine whether these laws violated the Establishment and Free Exercise clauses of the First Amendment did the Court subject them to the "close scrutiny demanded of us when First Amendment liberties are at issue." The majority of the Court was willing to accept the Maryland Supreme Court's determination that the statute's purpose and effect were not to aid religion but to set aside a day of rest and recreation, and did not affect the right to free exercise of religion.

The dissents of Mr. Justice Douglas to the *McGowan* decision, 366 U.S. 420, and of Mr. Justice Brennan and Mr. Justice Stewart in the related Pennsylvania case of *Braunfeld v.*

Brown, 366 U.S. 599 (1961), were based on the ground that the statutes in question violated the Free Exercise clause of the First Amendment and could not survive "close scrutiny."

While the statutes under consideration in *McGowan* and its companion cases admittedly imposed a burden on minorities who worship on other days than Sunday, or on no days, the Court looked to the *purpose* for which those statutes were enacted and a majority found that they had not been for the purpose of assisting Sunday worship or to discriminate against Jews and Seventh-Day Adventists. This was despite a clear adverse effect on the minority complainants, in deprivation of what would have been a fundamental First Amendment right had the purpose been to prefer Sunday worshippers or to deter Saturday worshippers.

Similarly, in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 89 S. Ct. 1404, 22 L. E 2d 739 (1969), this Court was unwilling to strike down an Illinois statute providing for absentee balloting by certain classes of individuals, upon the ground that Mr. McDonald and his co-appellants (unsentenced inmates of the Cook County jail who were qualified Cook County electors who could not appear at the polls because they were charged with non-bailable offenses or because they had been unable to post the bail imposed by Illinois courts) were not included in the class benefited. As Mr. Chief Justice Warren stated in the opinion for the Court, 394 U.S. at 807-808:

> "Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise.
>
> . . . .

> Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting. We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. [Citing *McGowan v. Maryland, supra*; *Kotch v. Board of Riverport Pilot Commissioners*, 330 U.S. 552, 67 S. Ct. 910, 91 L. Ed. 1093 (1947); *Lindsley v. Natural Carbonic Gas Company*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911)]"

On this analysis, the law school's minority program must be upheld, notwithstanding Mr. DeFunis' complaint, if it bears a rational relationship to a legitimate state end, a finding that can hardly be disputed on this record.

E. *The University has an affirmative duty in pursuit of its educational mission which requires it to take reasonable steps to seek and maintain a racially integrated student body.*

This Court's concern for and recognition of the importance of a pluralistic integrated educational opportunity for *all* students attending publicly supported educational institutions predate its landmark decisions in *Brown v. Board of Education*. Particularly is this so in the fields of higher education. Thus, in *Sweatt v. Painter*, 339 U.S. 629, 70 S. Ct. 848, 94 L. Ed. 1114 (1950), this Court was considering the petition of an applicant who was rejected from the University of Texas

Law School "solely because" he was a Negro. Mr. Chief Justice Vinson, speaking for a unanimous Court, observed:

> "... [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." 339 U.S. at 634.[24]

More recently this Court in its unanimous opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267 (1971), recognized the discretionary authority of school officials to correct the effects of past discrimination as a matter of important educational policy. While the Court there was concerned with the judicial authority to correct failures of school authorities in "their affirmative obligations to eliminate from the public schools all vestiges of state-imposed segregation," it recognized that

> "Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflect-

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24. The Advocate Society etc., in their brief *amici curiae* in support of petitioner, p. 13, equate *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 76 S. Ct. 464 (1956), with the facts in this case because the black plaintiff there was denied admission solely because of race to the University of Florida School of Law. We have no argument with that decision, but do not believe it applies to the facts of this case since Mr. DeFunis was not denied admission to the Law School solely because of his race, and, unlike Mr. Hawkins, he is not black.

> ing the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. at 16.

Surely it is as important for school authorities to have the authority to prepare law students to practice law in a pluralistic society, and to assume the roles of leadership that society so frequently accords to lawyers, as it is to prepare students in primary and secondary public schools to live as members in a pluralistic society. As has already been noted, this Court in *Sweatt v. Painter* long ago recognized legal education as especially dependent for its adequacy on association and interchanges among students.[25]

It is true that university and law school education is different from primary and secondary education, partly because a state does not attempt to provide, indeed it cannot provide, legal education to all qualified applicants. The University of Washington could only do so if it followed the suggestion in the Washington Supreme Court's dissenting opinion that classes be held in the University stadium (which seats more than 50,000) and all applicants with certain grades and certain prescribed courses be admitted. As Chief Justice Hale wrote, this would be fair but, as even he recognized, it would not be effective. (82 Wn.2d at 66; Juris. St. A-55.) At least since Dean C. C. Langdell introduced the case method at Harvard Law School, legal education has been increasingly participatory. It

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25. See, also, *Sweatt's* companion case *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S. Ct. 851 (1950), where this Court recognized the heavy responsibility imposed on a state to provide *truly* integrated facilities in its graduate and professional schools in order to afford the best possible training for the students who are so likely to become future leaders of the state and nation.

has been Socratic. Socrates could not stand on the fifty-yard line and interrogate Alcibiades on the rim of the stadium behind the goal posts.

The most sensitive decision in higher education in a generation when sensitive students insist that they must not be stapled, bent, or mutilated is the balance between numbers of students and quality. Marco DeFunis, Jr., will complete his education several months hence. In the judgment of the Board of Regents of the University of Washington and the Dean and faculty of its Law School, it will be a better education because he was not educated in classes held in the stadium. It will be a better education because it was not education in a racially segregated student body. That judgment respondents defend as right; they also defend it on the ground that it is an educational judgment which school authorities are properly charged with making, whether right or wrong.

F. *Preferential admissions policy benefited the "non-minority" class of which Mr. DeFunis is a member*

At the trial level, before the Washington Supreme Court, and in respondents' Motion to Affirm before this Court, this issue was raised: If no minority preference had been extended, would Marco DeFunis have been admitted to Law School? Because Mr. DeFunis was in the bottom quartile of a waiting list, it seemed clear that he would not have been reached had no minority students been admitted on any basis, preferential or otherwise. Respondents urged that for this reason he had no standing to raise the equal protection issue. The Washington Supreme Court found it unnecessary to resolve the factual issue and held, in effect, that Mr. DeFunis had standing whatever his prospects. (82 Wn.2d at 23-24; Juris. St. A-14-15.)

It is clear that absent the preferential admissions policy, a larger number of non-minority students would have been admitted. There may well be considerations which justify or compel resolution of the issue on a more liberal than usual standing basis. Hence, we do not press the standing issue. However, it is of the greatest importance to recognize that the issue is not one of competition between applicants of minority and of a majority race when the *true* interests of *all* applicants are appraised. In *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 2163, 33 L. Ed. 2d 83 (1972), and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 93 S. Ct. 364, 34 L. Ed. 2d 415 (1972), this Court recognized a right of all races to be free of the stigma and odium of segregation. Thus, in *Peters v. Kiff*, the white accused was found to have standing to challenge exclusion of Negroes from the grand jury indicting him and the petty jury trying him. And in *Trafficante*, this Court held a white tenant has standing to challenge the policy which forces him to live in a white segregated ghetto. Educational values were not involved in those cases, but the cases, nevertheless, make clear the interest of the majority race in non-segregation. Education of lawyers for the 21st century is at least as important as the apartment where one now lives. Particularly is this true when education—like legal education—depends more upon what happens between student and student than what happens between student and professor.

If the University and its Law School had pursued an admissions policy which was based solely on mechanical indicia of success, choosing those whose indicators predicted the greatest success, the evidence shows that few, if any, minority members would have been a part of Mr. DeFunis' law school class. What *Trafficante* and *Peters v. Kiff* teach us is that under those circumstances a successful white applicant could well

have successfully challenged such an admissions policy because it denied him the opportunity of a fully integrated legal education.

G. *The preferential minority admissions policy at the University of Washington is arguably compelled and, hence, it would be incongruous to forbid it on constitutional grounds.*

While there are no statutes or officially promulgated regulations by which white applicants to the University of Washington and its Law School have ever been preferred, the almost totally all-white character[26] of the student body at the Uni-

26. Dr. Charles E. Odegaard, one of the respondents in this action and President of the University during all times leading up to these proceedings and since 1958, testified at the trial of this matter as follows:

"[In 1959] this collective statement on nondiscriminatory practices in the University [was issued] and affirmed that in a sense what I suppose you could call an open door, and that is the way the matter stood for several years . . .

. . .

Well, I think most of us, at the time, felt that the University policy was clear and was sufficient as it was announced in 1959.

At Commencement in 1963, when a large number of students, all the schools and colleges granting degrees at the University, the students filed by. I walked out with the regents following immediately after me, and we went into the area where we change from academic garb to conventional street clothes. As soon as we got in there, the question was raised—I don't know which individual it was, it was sort of in all our minds, because we had been more conscious of racial problems here in Seattle and we said—'Where are the black students? Where are the black students?' . . . . [I]t just left us with the question, why is it?' With our open door policy, we had so few that seemed to be coming through. If they cannot go through these halls and acquire the kind of educational background required for many of the roles in society, they obviously are not going to share more fully in the American way of life and feel a part of the society into which they have been born.

. . .

Well, more and more as we dug into this, we began to realize that there can be a presumption of legal equality or procedural equality at the University but, in fact, cultural conditions which deter certain persons, either by reason of extreme poverty or what frequently goes with this, by reason of separation from the conventional life of the times, and even from the conventional schools of the area, from

versity and its Law School before affirmative actions were taken to increase minority representation would, if the student body had been a jury, compel the prosecution to prove the absence of intentional or systematic discrimination. *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954).[27]

Clearly, if the University were chargeable with *de jure* discrimination, either because of statute, regulation, or demonstrable custom—or because of a shift in burden of proof which the University could not meet—a compensatory admissions program would be a recognized corrective, and some corrective measure would be compelled. *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

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acquiring the backgrounds necessary to move into more responsible roles in American life.

So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produce something other than equality was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington . . .

Meanwhile, in the United States of America, there was developing, also, an awareness that something more was needed, and I think the language—we didn't think it up in the beginning—I think it is now the national parlance, 'affirmative action', and the University, like many other institutions, has come under the continuous scrutiny and review to the degree with which it is affirmatively complying with the expectation, with the equalization of opporutnity in the United States.

We are, indeed, under compulsion to be affirmatively complying in achieving a better distribution of opportunity." (St. 221-225.)

27. Although the date of the beginning of affirmative action admissions at the University of Washington Law School was not discussed at the trial, one exhibit (Exh. 7, St. 134) showed that there were nine black students enrolled in the Law School in 1969. Law School records show that the PFYA's of those students were 76.4, 72.8, 72.4, 71.2, 68.7, 68.3, 68.0, and 65.8. It is thus clear that had there not been a minority admissions program in operation between 1967 and 1969, the school would have been almost exclusively white.

It would be wholly incongruous to require a program like that of which Mr. DeFunis complains at a state university with a past history of racial segregation and, at the same time, forbid that same program as unconstitutional at a state university whose record for non-discrimination is beyond reproach.

The State of Washington, like the other Pacific Coast states, has been the beneficiary (or the victim) of a great population influx of all races since World War II. Washington could not keep any of these migrants out of the state even if it chose. *Edwards v. California*, 314 U.S. 160, 62 S. Ct. 164 (1941). Nor does the University of Washington and its Law School restrict admission to residents of this state. The educational disadvantages of segregated education elsewhere have left their mark on the applicants who seek to study law in Washington. This Court has never considered the problems created by racial segregation to be regional. Mr. Chief Justice Warren traced the origins of the doctrine of racial segregation to the City of Boston where it was sustained in a court challenge in 1850. *Brown v. Board of Education*, 347 U.S. 483 at 491, n.6; 74 S. Ct. 686 at 690; citing *Roberts v. City of Boston*, 5 Cush. 198, 59 Mass 198 (1850).

One need not take sides on the issue which divided the Court in *Keyes v. The Denver School District No. 1*, 409 U.S. 818, 93 S. Ct. 2686, 37 L. Ed. 2d 548 (1973), whether the *de jure* versus *de facto* distinction has validity and, if so, what are the distinguishing marks of each. The fact is that the University of Washington's Law School would be a segregated school of some kind but for a compensatory admissions program. There is no decision of this Court which holds or hints that a university is precluded, because it has never been

guilty of racial discrimination, from doing what it would be compelled to do had it intentionally discriminated against a minority race at an earlier time in its history.

Nor do we agree with the Jewish Rights Council (*Amicus* Br. 12) and the Advocate Society etc. (*Amici* Br. 16.) that this Court's statements in *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), should disqualify the admissions program here challenged. While the Court there was concerned with the application of Title VII of the Civil Rights Act of 1964 (78 Stat. 243, 42 U.S.C. §§ 2000a-2000e-15) to the use of testing devices which had the effect of excluding racial minorities from employment opportunities, Mr. Chief Justice Burger held that

> "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. at 430.

The University of Washington Law School's admissions policy (no more than Title VII does for employment) does not "guarantee" a minority applicant a position at the University of Washington Law School regardless of his qualifications and only because he is a member of a minority group. Even by the mechanical indicators, combined with the special training afforded by the CLEO institutes, no one was admitted to Mr. DeFunis' law school class nor invited to attend the University of Washington Law School who was not predicted to succeed. But if only those who were predicted by the test scores and grade point averages to have the greatest success were admitted, few, if any, minorities would have been invited to attend the University of Washington's Law School Class of 1974.

H. *Objections to choice of minority groups and to explicit identification of "race" are without merit.*

1. The choice of which minority groups would be affected by the program was determined by the program's objective: to alleviate their under-representation in the school and the profession.

The Law School's published admissions standards (St. 407, Exh. 45.) made no reference to the specific minority groups which would be affected by the consideration of race. In the year in which Mr. DeFunis applied to the Law School, the testimony below shows that the consideration of race affected principally black, Chicano, American-Indian and Filipino applicants. (St. 351.) It has been suggested in some of the *amicus* briefs supporting the petitioner that the process was defective in that Asian Americans generally, and possibly other minority groups not listed, should have been included in the Law School's minority admissions program.

The suggestion apparently is that any minority group which has been deprived should be entitled to inclusion in a program of this kind and especially those groups whose deprivation has taken place in the geographical area in which the law school sits. The premise of this contention is simply mistaken. The Law School's program, as indicated clearly by the testimony below, was not primarily intended to redress wrongs done to minority group members individually, nor only to compensate groups who may have been subjected to deprivations by the State of Washington. The objective was different. It grew from the fact that law schools have historically been part of the problem of under-representation of minorities in the profession. In earlier days, there were in the country patterns of discrimination which deprived minority applicants of oppor-

tunities for legal education.[28] Today, mounting admissions pressure and unnecessarily strict reliance on numerical admissions predicters are having precisely the same effect.

The adoption by today's law schools of minority admissions programs marks an attempt by the schools to cease contributing to the problem and to begin assisting in its solution. The objective of the respondent school's program, therefore, was simply to conduct an admissions program in such a way that the historic under-representation of all racial minority groups in the legal profession and in the law school classroom would be ameliorated rather than exacerbated. With this objective, there was no need to extend the application of preferential standards to applicants from minority groups which in the applicant population of a particular year were sufficiently well represented as to ensure the admission of a sufficient number of such minority group members without respect to any minority admissions program.

The committee specifically addressed the question of the appropriate treatment of Asian American applicants generally, and concluded that "on the basis of the . . . large number of Asian American applications and the significant number that had been accepted in the . . . ordinary review of the files, that that group, for this purpose, would not be treated as a minority group." (St. 352.)[29] Since 1971, variations in the applicant population have resulted in the preferential admission of some Asian applicants.

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28. Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069. The 1970 University of Toledo Law Review devotes its entire volume to a symposium on the problems of minority access to the law schools and the legal profession.

29. Other law schools have reached the same conclusion for a particular year regarding Asian Americans. See, *e.g.*, the statement of the Yale Law School in *1972-73 Pre-Law Handbook—Official Law School Guide*, p. 345.

The inclusiveness of the group affected, therefore, was specifically related to the problem being addressed.

2. Why the Law School chose "race" as the standard rather than "cultural deprivation" and/or "economic deprivation."

Some of the *amici curiae* supporting the petitioners argue that while the program followed at the University of Washington Law School does not pass constitutional muster, the Law School, as well as other institutions of higher education, must affirmatively seek to correct the effects of past racial discrimination in this country. Yet they argue that only those programs which do not consider race can pass the constitutional standa ds they support. (See, *e.g.*, Brief of Advocate Society, etc., Part III, pp. 25 ff.)

It is true that in some institutions of higher education affirmative action programs are couched in such terms as "for the culturally deprived" or "for the economically deprived." Since such programs are not described in terms of the racial minorities to be benefited, it is argued that they may pass the constitutional tests even though it is widely acknowledged that they are, indeed, intended to correct the effects of past racial discrimination.

As has already been observed, the law school program was not designed primarily for the purpose of benefiting the minority applicants who would be admitted under that policy, but was specifically undertaken to correct racial imbalances not only in the law school but in the legal profession generally. Most institutions pursuing such objectives have now abandoned the timid, euphemistic and vague jargon of "disadvantaged," "culturally-deprived," and "economically-deprived" for the more straightforward recognition that the programs are

designed for racial minorities and are, therefore, called special programs for "minority" students. The Council of Graduate Schools in the United States reported in 1973:

> "Finally, it is clear that for almost all institutions the students who are recruited into their special programs are identified as 'minority' students rather than 'disadvantaged.' While it is well known that not all minority students are disadvantaged, for the purposes of institutional policy and efforts, a minority designation is operationally the most significant descriptor."[30]

Since the Law School was specifically concerned about the under-representation of certain racial minorities in the Law School and in the legal profession, it chose the most precise decisional component possible: race. In doing so, it followed the almost universal practice of higher educational institutions throughout the country that are designing and implementing special programs for minorities.

II.

IF RACE IS FORBIDDEN AS A FACTOR, LAW SCHOOLS ALL OVER THE UNITED STATES MUST ABANDON AFFIRMATIVE ACTION PROGRAMS AIMED AT INCREASING MINORITY REPRESENTATION

The problem which led to the law school admissions program here challenged is universally recognized. The Univer-

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30. Hamilton, *Graduate School Programs for Minority/Disadvantaged Students*, Report of an Initial Survey, Graduate Record Examinations Board, Council of Graduate Schools in the United States, Princeton, New Jersey, 1973, a report on a comprehensive survey sponsored by the Council of Graduate Schools in the United States and the Graduate Record Examinations Board of special programs for minority *graduate students* at the 302 member institutions of the Council of Graduate Schools in the United States. Copies of the report are available at the Educational Testing Service, Princeton, New Jersey 08540.

sity of Washington School of Law is only one of many law schools throughout the nation which have adopted special admissions policies for minority applicants, aimed at increasing the representation of certain racial minority groups in the law schools and the Bar.[31] The proceedings of the 1970 annual meeting of the Association of American Law Schools reported that only two of all the schools reporting to the AALS have not applied special standards in admitting minority students.[32] The 1973 publication of the Association of American Law Schools and the Law Schools Admissions Council, entitled *1973-74 Prelaw Handbook—Official Law School Guide* (1973-74), was published to assist persons seeking admission to the accredited law schools of the United States. Such accredited schools were invited to submit for publication information about their prerequisites for admission. Thirty-eight schools presented statements concerning their special minority programs. While the statements and programs may vary from institution to institution, and while all institutions did not include statements concerning their minority admissions pro-

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31. The American Jewish Congress in its *amicus curiae* brief in support of petitioner at page 12 asks whether it can "be seriously urged that these white attorneys [Jack Greenberg, Anthony Amsterdam and Michael Meltzner] are unable to understand, empathize with, articulate and represent the views, needs and interests of minority groups to which they do not belong but whose cause they frequently plead?" Of course, we do not. On the contrary, we are grateful for the splendid services those attorneys and many others have rendered in the civil rights movement for the benefit of all Americans not just the victims of racial discrimination.

However, until black people have a choice of a black lawyer or a white lawyer—until all races are adequately represented at the Bar—we will not have accomplished the purpose of the Thirteenth, Fourteenth, or Fifteenth Amendments, nor can all the white lawyers in the land persuade black people that all persons are equal before the law. See, Comment, *Selected Bibliography: Minority Group Participation in the Legal Profession*, 1970 U. of Toledo L. Rev. 935.

32. *The Law Schools and the Minority Group Law Students, A Survey for the American Association of Law Schools Committee on Minority Groups*, p. 1, § II.

gram for publication in the *1973-74 Prelaw Handbook*, the following are excerpts from some of those public and private institutions that did:

University of Alabama—"There is a special program involving recruitment, admissions, and financial aid for students who are members of minority groups." p. 69.

Hastings College of the Law, University of California—"Hastings has a large affirmative program for the admission of members of minority groups." p. 99.

University of Colorado—"The School of Law is interested in increasing the number of persons from minority groups in the practice of law. Accordingly, a special program has been established for members of minority groups whose credentials are somewhat below those ordinarily required for admission. The program includes eight weeks in the summer immediately preceding the first year of study, as well as academic assistance during the first year . . . ." p. 119.

University of Illinois—"The Illinois Equal Opportunity Fellowship Program is a special program for minority group applicants." p. 175.

University of Kentucky—"Applicants who are members of minority groups are considered specially by the admissions committee, particularly if they have completed a preparatory program." p. 187.

The University of Michigan—"Black students and persons from disadvantaged backgrounds are given special consideration." p. 212.

University of Minnesota—"Special programs of recruitment, admission, and financial aid exist for minority group students." p. 215.

University of Pennsylvania—"For the class that entered in September 1972, the median LSAT score was 685 and the median cumulative undergraduate grade-point average was 3.55. In the case of minority students, the median

LSAT score was 544 and the median GPA was 2.92." p. 263.

Rutgers—The State University—"There is a special program involving recruitment, admission and financial aid for students who are members of minority groups." p. 277.

University of Utah—"There are special programs involving recruitment, admissions, tutorial assistance, and financial aid for students from disadvantaged and minority groups." p. 331.

University of Wisconsin—"There is a special program involving recruitment, admissions, and financial aid for students who are members of minority groups." p. 361.[33]

The foregoing indicates the impact which this Court's decision will have not only upon the disadvantaged minorities of this country, but also upon its law schools and the legal profession.

The problem of minority admissions in law schools today is especially critical since the phenomenal growth of applicant populations and the very small percentage of minority applicants in those populations mean that minorities will be virtually excluded by any selection criterion that does not include some racial component.[34] All over the land, not just in those schools which have had a history of segregated school facilities, law schools have in the last few years invited black Americans and other historically deprived minorities to take the first step in joining the legal profession. This case will

33. See also pp. 9-10 of the *1973-74 Prelaw Handbook*. Special minority admissions programs have also been in effect at Yale Law School (See *1972-73 Prelaw Handbook—Official Law School Guide* (1972-73) p. 345) and at Harvard Law School (See McPherson, *The Black Law Student*, The Atlantic, April, 1970, p. 93.).

34. For general discussion of this aspect of the problem, see Andersen, *The Admissions Process in Litigation*, 15 Ariz. L. Rev. 81, 100-02 (1973).

determine whether or not those invitations, insofar as they extend preferential consideration in admissions, are to be canceled by implications of an amendment to the United States Constitution whose primary purpose was to guarantee black Americans equal protection of the laws.

CONCLUSION

For the reasons set forth herein, as well as those stated by the *amici* supporting the respondents, the decision below should be affirmed.

Respectfully submitted,

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January 29, 1974

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APPENDIX A

While neither petitioners nor *amici* supporting them rely on the dissenting opinion of Chief Justice Hale in the court below to support their arguments, respondents believe that his opinion is sufficiently misleading that is would be helpful to this Court to have before it a detailed analysis of the treatment of facts in that opinion.[1]

The Dissenting Opinion By Chief Justice Hale In The Decision Of This Case By The Washington Supreme Court Relies Upon Substantial Errors of Fact.

The policies, evaluative criteria and procedures followed by the Admissions Committee in the process of selecting applicants for admission to the Law School in 1971 are fairly and accurately described in the statement of the facts in the decision of the Washington Supreme Court (quoted at pages 3-15 of this Brief) and in greater detail in the Answers To Interrogatories Propounded By Plaintiffs prepared by Professor Richard O. Kummert which were admitted in evidence and are printed in the Single Appendix. (St. 56, S. App. 23, particularly at 29-37.) Those descriptions of the selection process are supported by other essentially uncontradicted evidence in the trial record. The record wholly shows that the Law School acting through its Admissions Committee conducted the admissions selection process carefully, fairly, rationally and systematically. Despite their difference of opinion on the constitutional issues presented by certain of the admission policies of the Law School, neither the trial court nor the majority justices of the Washington Supreme Court found reason to criticize the soundness and propriety of the decision-making process employed by the Law School.[2]

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1. Dean Richard S. L. Roddis of the University of Washington Law School assisted in the preparation of this appendix.

2. In his oral decision, the trial judge, Judge Shorett, after expressing his opinion that the minority admissions policy of the Law School constituted a denial of equal protection, stated that "The other claims made by the plaintiff are, in my opinion, without merit." (S. App. 57.) And as the opinion of the Supreme Court of Washington pointed out, the trial court refused to find that the standards and procedures for selection were deficient. (82 Wn.2d 11, 39, Jur. St. A-29.) The Supreme Court of Washington also considered and rejected the contention that the procedures employed by the Law School in selecting applicants to be admitted were arbitrary and capricious. (82 Wn.2d 11, Jur. St. A-28.)

Unfortunately, one dissenting opinion in the Washington Supreme Court, by Chief Justice Hale and concurred in by Justice Hunter, unfairly conveys a general impression of inconsistency, irrationality and capriciousness in the conduct of the process of selection of applicants to be admitted. (82 Wn.2d 11, 45, Jur. St. A-36.) That dissenting opinion, however, is pervaded with inaccurate and distorted factual assertions.

The purpose of this appendix is to identify and correct these errors of fact which are many in number and varied in character. Analytically, however, three main points can be identified which have important significance and which are demonstrably false. Other errors of fact are either of lesser import or are subsidiary to one of these following principal points:

1. That comments written on applicant file jacket covers by individual committee members reflected views or actions of the Admissions Committee.

2. That in a number of instances applicants were admitted by action of the deans contrary to or in the absence of decision by the Admissions Committee.

3. That the decision making by the Admissions Committee was unsystematic and inconsistent in that it did not apply the policies which it purported to follow.

I. *The Comments Written On Applicant File Jacket Covers Did Not Represent The Determinations Of The Committee.*

The seminal factual error in Chief Justice Hale's dissenting opinion is the treatment of various comments or notations written on applicant file jackets by individual committee members as constituting summaries of committee determinations or findings. To a large extent, this distorted significance accorded to the jacket comments is the "evidence" relied upon in the opinion to establish the other erroneous factual conclusions which permeate it.

The front of jackets used for applicants' files were imprinted with a form like that on the opposite page. (See Exh. 43 being

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Three justices joined in a concurring opinion suggesting the desirability of publishing a more complete statement of the standards for admission. (82 Wn.2d 11, 44-45, Jr. St. A-35.)

A-5

LSDAS	EVAL	B	C	R		

APPLICANT
Accepted
Declined
Waiting List

FILE CLOSED
No response to offer
Application incomplete

ADMISSIONS COUNCIL
Accept
Reject
Waiting List

Quarter and Year
Expects degree
From
Major

NOTES	

PFYA Points

Prelim Jr-Sr
PO
LSAT
Writing
Background

+ 51.3

Predicted PYA

TRANSFER
Law School
Class Standing
First Year Average

an Affidavit of Richard O. Kummert in Support of Defendants' Motion to Quash Subpoenaes Duces Tecum and for Order Limiting Scope of Examination to which a copy of this form was attached. The affidavit is in evidence. St. 338, 364. See also Exhs. 2, 15-42. A very few files opened in earlier years when the person first applied were in plain jackets. See Exhs. 22 and 32.)

The relevant information called for on the right hand portion of the jacket covers was filled in by a staff person in preparing the files for committee review. (St. 254, 272.) These data included the applicant's name, degrees, prior college, major, junior-senior undergraduate grade point average, postgraduate average if any, LSAT scores, and the computation of the PFYA. (See Exhs. 15-21, 23-31, 33-42; St. 288-289.)

It will be noted that in the upper left hand portion of the jacket there are spaces in which to reflect actions by the "Admissions Council" which was the term then employed to refer to the Committee on Admissions and Readmissions (*i.e.*, "Accept," "Reject," or "Waiting List"), responses by the applicant (*i.e.*, "Accepted," "Declined," or "Waiting List"), and reasons for administrative file closure if that occurred ("No response to offer" or "Application Incomplete"). Actions with respect to the file of any of these varieties were indicated by stamping or occasionally writing the date of action in the appropriate printed space.

In addition, there was an area imprinted with lines and headed "Notes."

When the large number of midrange files, and others to be reviewed with them pursuant to prior screening, were ready for committee review they were distributed randomly by the chairman among individual committee members for initial review and report to the full committee. (S. App. 30-31; St. 253-254, 343-345.) The mechanism by which the committee deliberated on applicant files involved a prior review of the file by a committee member, a report by that member to the full committee, discussion by the full committee, and finally a committee vote on the disposition of the application. (St. 255, 257, 290-291, 316, 347-348, 359-360.)

In their initial reading, committee members frequently made comments or notations on the file jacket of an applicant to

assist in their job of reporting to the full committee. (St. 253.) Since there was debate on each applicant, a particular member's own recommendation to the committee might not always be followed. (St. 314.) Hence, the member's notes on the file jacket might not be consistent with the official committee action noted also on the file jacket. The committee decisions, however, were shown by date notation in the appropriate space at the top of the jacket cover.[3]

In his dissenting opinion, Chief Justice Hale repeatedly refers to the comments or notations by individual committee members as if they reflected committee views or actions. Thus, comments on files are characterized variously as follows:

> "The admission committee notes in his file read as follows . . . ." (82 Wn.2d 11, 57, Jur. St. A-47.)
>
> ". . . despite the remarks of the admissions committee that he be rejected." (82 Wn.2d 11, 58, Jur. St. A-48.)
>
> ". . . despite the admission committee's remarks set forth in his file . . . ." (82 Wn.2d 11, 58, Jur. St. A-48.)
>
> "The remarks entered by the admissions council in her file note that she was 'Divorced with five kids. Could make it if her personal situation could be worked out.' It added, 'Excellent recommendations; sound record,' and upon these conclusions recommended admission to the law school." (82 Wn.2d 11, 58, Jur. St. A-48.)

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3. During its major review of the large pool of midrange applicants during May, the committee as to each applicant decided to either admit, deny, or offer a waiting list position to the applicant. (S. App. 31-32.) At that time, as a rather large waiting list was then thought to be necessary (St. 333-335.), the committee also ranked those on the waiting list in four alphabeticaly labeled groups, sometimes referred to as the "quartiles" of the waiting list though the four groups were not of equal size. (Finding XVII, S. App. 50-51; St. 348.) The four groups were denominated, from highest to lowest, as "B," "C," "D," and "E." At a meeting on July 21, 1971, the committee decided that the attrition to that time among applicants who had been offered admission was such as to warrant some further offers of admission from the waiting list and that it would not be necessary to continue the entire waiting list group. (St. 354, 381.) Hence, it decided to offer admission to 25 persons from the highest or "B" group, to deny the persons in the lowest two groups, "D" and "E," and to consolidate the balance into a single final waiting list for future action. (Findings XVII and XVIII, S. App. 50-51; S. App. 33; St. 354.) Offers to admit from that final waiting list were made in mid-September. (St. 367-368, 381.)

"... the determining factor for admission here as revealed in the file is the remark on the admissions council list...." (82 Wn.2d 11, 59, Jur. St. A-48.)

Each of these is a reference to comments written on a file jacket by an individual committee member. These were not statements of committee view or action; indeed, one is a reference to a comment made in a prior year when the individual first applied and is so dated. (Exh. 26, sheet 2; see *infra* pages A-37-38.)

This mischaracterization of the jacket comments might be a trivial error were it not for the fact that Chief Justice Hale relies upon the import which he accords to them to show either that the committee based its decisions upon aberrant considerations or that the deans admitted individuals contrary to the committee decisions.

The true character of the notations on the file jacket as reminder observations written by a single committee member assigned to review the file and open committee discussion of it is manifest not only from an analysis of the files themselves but from various statements in the trial transcript. (St. 253, 267, 308, 347, 359.)

II. *Admission Decisions Were Made Only By The Committee, Not By The Deans.*

In his discussion of the decisions made with respect to four individual applicants, Chief Justice Hale states or implies that the deans admitted the applicants contrary to or in the absence of recommendations by the Admissions Committee.

This is not true, however. The deans did not make admission decisions apart from the committee process. The four applicants adverted to in this vein in the dissenting opinion are those whose files were Exhibits 19, 25, 26, and 38. In each case, the committee action is disclosed by the exhibit itself and the decision communicated to the applicant was in accordance with the committee action.

An analysis follows of each of the four applicant files as to which Chief Justice Hale asserts or implies that the deans admitted the applicants other than as recommended by the committee. The files are identifiable by comparing the numeri-

cal indicators mentioned in the statements in the opinion with the files in evidence.

A. The applicant whose file is Exhibit 38 is the person referred to in the following statement by Chief Justice Hale:

> One young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council. (82 Wn.2d 11, 58, Jur. St. A-47.)

The file shows that this applicant was placed on the waiting list by the committee on May 13, 1971, and was so advised by letter dated May 21, 1971. (Exh. 38, sheets 2, 8.) She was admitted from the waiting list by the committee on September 13, 1971,[4] and was so advised by letter dated September 14, 1971. (Exh. 38, sheets 2, 3.)

B. The applicant whose file is Exhibit 26 is the person referred to in the following statement in the dissenting opinion by Chief Justice Hale:

> An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected. (82 Wn.2d 11, 58, Jur. St. A-48.)

The file discloses that this applicant, a minority person, was placed on the waiting list by the committee on May 26, 1971, and admitted from the waiting list by the committee on July 21, 1971. (Exh. 26, sheets 3, 6, 9.) The "remarks of the admission committee that he be rejected" to which Chief Justice Hale adverts are comments written on the file by a committee member the year before when the applicant first applied and was rejected. The comment is dated "4/26/70." (Exh. 26, sheets 3, 27, 19.)

C. The applicant whose file is Exhibit 25 is the person referred to in the following statement in the dissenting opinion by Chief Justice Hale:

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4. Professor Kummert described the process of admitting the last group to fill out the vacancies remaining in the class as of the time of trial in mid-September 1971. (St. 367-368.)

> Another applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his "recommendations are equivocal and his academic career unimpressive." (82 Wn.2d 11, 58, Jur. St. A-48.)

The file shows that the committee placed the applicant on the waiting list on May 10, 1971, and he was so advised by letter dated May 21, 1971. He was admitted from the waiting list by the committee on July 21, 1971, and so advised by letter dated July 23, 1971. (Exh. 25, sheets 2, 5, 8.)

D. The applicant whose file is Exhibit 19 was the subject of the following statement in the dissenting opinion by Chief Justice Hale:

> An applicant with a GPA of 3.55 was notified of his acceptance by the law school by letter of May 21, 1971, from the associate dean after achieving an LSAT of 625 and a writing score of 61. For some reason or other, the admissions committee recommended against outright admission but that he be placed on the waiting list. *Despite this, however, the applicant was categorically admitted.* (82 Wn.2d 11, 59, Jur. St. A-49.) (Emphasis added.)

We can identify no evidentiary basis from which one could derive, even by misinterpretation, the conclusion stated in the emphasized language.

The applicant was placed on the waiting list by action of the committee on May 12, 1971, and he was so advised by letter from Associate Dean Hunt dated May 21, 1971. (Exh. 19, sheets 2, 6.) Actually, he never was thereafter admitted for when the Admissions Secretary attempted to contact the persons remaining on the waiting list in September, she was only able to reach the applicant's mother who advised her that he had enrolled elsewhere and agreed that he should be withdrawn from the waiting list. (Exh. 19, sheet 3.)

The suggestion that admission decisions were made by the deans apart from the committee process appears only in the dissenting opinion by Chief Justice Hale. It has no basis in the record of the trial, the findings by the Superior Court, or in the argument of the parties.

Associate Dean Robert S. Hunt was a member of the committee and acted as its administrative arm in communicating its decisions to applicants. (St. 329.) The admissions function had been delegated to the Committee on Admissions and Readmissions and the Dean had little involvement in the process. (St. 59-62.)

III. *The Committee Decision Making Process Was Systematic And Consistent.*

Chief Justice Hale's dissenting opinion conveys the impression in a variety of ways that the selection process by the committee was capricious in that it conducted its function in an unsystematic fashion or failed to apply with reasonable consistency the policy guidelines which it purported to be following. Whether or not this occurred is largely a question of fact. It essentially is the issue posed by Chief Justice Hale's assertion that:

> By all standards and requirements of the admission policies openly announced by the law school, he [Mr. DeFunis] should have been admitted.
>
> The way things worked out, however, the law school failed to apply even its own vague, loose and whimsical admissions standards. (82 Wn.2d 11, 48-49, Jur. St. A-39.)

It is not true that the committee decision making was unsystematic or inconsistent in the application of the policies which it undertook to follow. Given the policies and evaluative criteria which it purported to follow, the committee in fact proceeded carefully and systematically and any decisions with which one might disagree were well within the parameters of rational variations to be expected in any process of discretionary decision making.

In the following, we have attempted to identify, analyze and correct the factual errors and distortions relied upon by the dissenting opinion to support its assertion to the contrary.

A. The dissenting opinion exaggerates the extent to which factors other than predicted academic potential operated in the selection of applicants to be admitted.

It is admitted that the committee considered factors other than potential for academic success in law school as predicted by the numerical indicators of the undergraduate grade point

averages and the LSAT scores combined in the PFYA index. Thus, in the application of the military readmission rule[5] and in the carrying out of the minority admissions policy, the committee admitted a number of persons with numerical indicators of academic potential lower than those of other applicants who were denied admission.

Apart from these policies, however, the committee relied upon other evidences in addition to the numerical indicators in order to make a more refined judgment as to academic potential, and gave consideration to salient evidence that a particular candidate might be expected to make an unusual contribution to the educational environment of the school and to the profession. But these factors were accorded only limited and secondary significance in the selection of applicants for admission. (St. 360-361.) The dissenting opinion exaggerates the significance accorded these other factors in the selection process. It does this, first by misconstruing the evidence as to the number of applicants admitted with numerical indicators of academic potential lower than Mr. DeFunis' and, second, by attaching unwarranted significance to the comments written on file jackets by individual committee members.

1. *Relatively few applicants were admitted with PFYA indices lower than that of Mr. DeFunis.*

The dissenting opinion ignores the committee's primary reliance on the combined PFYA index rather than on either the undergraduate grade average or the LSAT scores alone. In this connection, Chief Justice Hale emphasizes the number of applicants who were admitted with lower grade averages than Mr. DeFunis rather than the relatively few who were admitted with lower PFYAs. Also, in his discussion of a handful of individual files, he avoids systematic comparison of them by

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5. The military readmission policy accorded automatic readmission to the Law School to applicants who had been admitted in previous years and either had been unable to attend by reason of involuntary entry into the military or alternative service or had enrolled but been forced to withdraw during the first year because of such reasons. (S. App. 31; St. 263, 349-350, 410-411.) Due to the escalation in the number and quality of the academic credentials of the persons applying to the Law School in recent years, some of the individuals readmitted pursuant to this policy did not have credentials which would have led to their admission in 1971 under competitive consideration. (St. 335-337; Finding XXVI, S. App. 53-54.)

PFYA position and gives an impression of random treatment. (See 82 Wn.2d 11, 57-59, Jur. St. A-48-49. At a later point in this appendix, *infra* page A-23, these illustrative files are compared by PFYA rank. Interestingly, the actual results of the decisional process even as exemplified by these few selected files shows a pattern following the PFYA indications to a remarkable extent.) Chief Justice Hale's summary of the overall results of the admissions process is as follows from 82 Wn.2d 11, 49, Jur. St. A-39-40:

> Of the approximately 155 enrolled in the entering law class in the fall of 1971, 29 had higher PFYAs than Mr. DeFunis, but there were 74, including minority students, with lower PFYAs. Excluding Asians, 18 of the 36 minority students with lower PFYAs than Mr. DeFunis actually did enroll; the other 18 notified of their admission, also with lower PFYAs than plaintiff, for reasons not discernible in the record did not enroll.
>
> Altogether, 275 applicants were given formal notice of acceptance into the class entering in the fall of 1971 and another 55 were put on a waiting list making a total of 330 students who were formally accepted or notified that they probably would be. The reason for giving notice of acceptance to 275 for a class which was limited to 155 is that usually many applicants apply to several schools; others, for one reason or another, are unable or disinclined to enroll. Plaintiff Marc [sic] DeFunis, Jr., was neither among the 275 notified of acceptance nor among those added to the waiting list of 55.
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> The discriminatory action in refusing his admission becomes even more glaring when an overall view is taken of the admission practices. Of the 275 students who were explicitly told they had been accepted to the entering 1971 fall class, 180 had lower junior-senior grade point averages than Plaintiff DeFunis and only 95 had higher. Of 330 accepted for admission, which included those notified of admission and the additional 55 placed on a waiting list, 224 had lower junior-senior grade point averages and only 106 had a better average—and this without allowing for the 9 hours of A in Latin he had received in his junior year. Among the 275 admitted, 44 were minority, *i.e.*, Afro-American, Philippine American, Chicano or

> American Indian, and of these 44 minority admitted, only 6 had higher academic qualifications than Mr. DeFunis and 38 had lower qualifiications.

The number of applicants referred to in the first quoted paragraph with PFYAs below Mr. DeFunis are erroneously related to the total of persons *enrolled* in the class rather than to the numbers *offered admission*. As the enrolled class was a much smaller number than the total of persons to whom admission was offered, this error tends to inflate the significance of the number with PFYAs below Mr. DeFunis.[6] The juxtaposition of this erroneous statement and the figures in the third paragraph which emphasize grade point average comparisons and ignore the significance of the LSAT scores in the PFYA formulation, serves to obscure the fact that the number of instances in which admission resulted from other than a pure combination of high grades and high LSAT scores was relatively small. (The figures involved are taken from Findings XVI-XX, S. App. 50-52.)

A far more complete and accurate statement on this point is the one in the majority opinion at 82 Wn.2d 11, 22, Jur. St. A-13:

> Because of the judgmental factors in the admissions process, as outlined, the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of these were minority applicants, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority

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6. Apart from its tendency to inflate the relative significance of the figures, the first sentence in the above quotation from the dissenting opinion which reads "Of the approximately 155 enrolled in the entering law class in the fall of 1971, 29 had higher PFYAs than Mr. DeFunis, but there were 74, including minority students, with lower PFYAs" is a garbled statement. Obviously, in an enrolled class of 155, there could not be 29 persons with higher PFYAs than Mr. DeFunis and 74 with lower PFYAs as those figures do not add up to 155. The facts as found by the trial court were that 29 applicants with higher PFYAs than Mr. DeFunis were denied admission and 74 with lower PFYAs, including 36 minority group applicants, were offered admission. (Finding XVI, S. App. 50.)

group students invited 18 actually enrolled in the first-year class.

The reference to 9 hours of A in Latin courses which were not taken into account is based on a finding but deserves passing explanation. These credits were earned in summer session between Mr. DeFunis' sophomore and junior years. (Exh. 1.) Committee policy was to use junior-senior academic year grades for the PFYA computation. (Finding XIV, S. App 50; S. App. 23.) In the case of an applicant who had completed undergraduate work and received a degree, this was taken as the last six quarters of the undergraduate academic credits. (St. 408-409.)

2. *Comments written on the file jackets by individual committee members do not accurately reflect the bases for the committee's decisions.*

Chief Justice Hale selectively emphasizes as evidence of the bases for committee decisions certain of the remarks written on applicant file jackets. As pointed out above these were not committee findings. Moreover, if one understands that these notations were merely self-reminders by individual committee members who read the files of salient points which they wished to bring to the attention of the whole committee to initiate discussion on the applicant and, further, that the academic indicator information (*i.e.*, the grade averages, LSAT scores, and PFYA) otherwise appeared on the front of the jacket, the limited significance of these comments is obvious. A good illustration of the fallacy involved in attaching determinative significance to these comments is the following excerpt:

> Another applicant admitted with a junior-senior grade point average of 3.56 had an LSAT of 625. Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: "Enthusiastic recommendation. Abundant community action projects." (82 Wn.2d 11, 59, Jur. St. A-28.)

To characterize the individual committee member's preliminary file comments rather than the high academic indicators as "the determining factor for admission" is a curiously speculative conclusion.

B. Applicants with PFYA indices within the range from which selections for admission were being made were not summarily denied by decision of individual members of the committee.

Chief Justice Hale asserts that individual members of the committee, including the student members, had the power to categorically reject substantial numbers of qualified applicants. He states at 82 Wn.2d 11, 54-55, Jur. St. A-44:

> Each member of the committee, including student members, was given approximately 70 files upon which to make recommendation for admission or rejection, with instructions that only about 10 were to be approved for admission and the remaining 60 rejected. Thus, of over 1500 files to be examined, 490 files were distributed among the committee members. Each member would arrive at what was determined to be a cutoff point below which the files would be summarily rejected, and in the usual course of events those files received no further consideration.
>
> Of the approximately 70 files given to each member, both student and faculty accordingly would return to the whole committee a recommendation of 10 for admission. Since the 70 files per committee member represented only 490 of some 1500 plus, Mrs. Zorn testified she assumed that several hundred applicants had been summarily rejected before distribution of the 70 files to each member, and quite possibly some had been summarily admitted. In general, it is a fair summary of the record, I think, that of the approximately 70 files distributed to each committee member, an applicant neither included in the 10 recommended nor in some 20 more carried as secondary possibilities had little or no chance for admission.
>
> Thus, some 40 student applicants were categorically rejected, another 20 given only secondary or uncertain chances, and 10 applicants put in a categorically positive position for admission upon nothing more than the recommendation of a first- or second-year law student. Mrs. Zorn testified that of the 40 files marked by her for rejection, she had no subsequent knowledge or further contact.

Chief Justice Hale's description of the process is critically in

error in the assertion that applicants were categorically rejected upon nothing more than the recommendation of a student member of the committee. In its consideration of the mid-range pool of applicants, the committee took up all files for review in descending order of PFYA rank. Hence, committee consideration of an applicant was not hinged upon the recommendation of the initial reviewer. (St. 346-347.) Professor Kummert's statement is as follows:

> The Committee then determined that, as an overall check upon the process, all files would be presented to the Committee in order of their predicted first year average, irrespective of the recommendations of the Committee member reviewing the file. It was felt that his procedure would result in the fairest comparisons that could be made between prospective candidates, while at the same time offering encouragement to the Committee member reviewing the file to offer complete justification as to why his recommendation regarding the applicant might have been different than the applicant's relative ranking based only on the predicted first year average would suggest. As a result of this process, on May 12, 1971 the Committe after having considered at meetings on May 10, May 11, and May 12 to that point 168 applications with predicted first year averages higher than Mr. DeFunis' average, which number included a number of applications with predicted averages quite close to the predicted first year average of Mr. DeFunis, reviewed the application of Mr. DeFunis and placed him in the lowest quartile of its waiting list. The Committee's meetings concerning this group of files continued on May 13, 14 and 17 during which time the Committee reviewed files in order of predicted first year average down through the lowest ranked applicant on such scale recommended by a Committee member for a waiting list position. (S. App. 32; St. 346-347.)

Mrs. Zorn's testimony, upon which Chief Justice Hale apparently relied, might warrant some inferences different from Professor Kummert's description but the total dialogue with her is uncertain and susceptible to various interpretations. (St. 253-259.)

At least one of the applicants specifically adverted to by Chief Justice Hale in his discussion of illustrative cases was a

situation where Mrs. Zorn recommended rejection and the committee decision was to place the person on the waiting list. This fact alone is inconsistent with the idea that categorical rejection occurred by unilateral action of the individual committee member. (Exh. 18.)

C. The discussion in the dissenting opinion of illustrative individual applicants does not accurately portray the decisional process.

In light of Chief Justice Hale's extensive reliance on the technique of proof by illustrative example, an analysis of the sample of applicant files to which he resorted for this purpose is illuminating. It will be recalled that 1601 completed application files were reviewed and acted upon. Of these, 330 either were offered admission or were on the final waiting list.

After having gained access to the files by discovery, one of the petitioners' attorneys reviewed all or a large number of them and selected those which they subpoenaed and sought to use at the time of trial. (St. 7, 322.) The only applicant files introduced were those offered by petitioners, presumably being those where petitioners' attorney thought there was "something wrong." (St. 8, 322.) In this fashion, 28 separate applicant files were identified in the record. (Exhs. 2, 15-42.)[7]

One given to judicious caution in the legal determination of facts would scarcely regard a review of a sample selected in this fashion as constituting what Chief Justice Hale describes as "A random examination of the records of various students accepted by the law school in the entering classes for which Mr. DeFunis had applied . . . ." 82 Wn.2d 11, 57, Jur. St. A-47.)

Of the 28 applicants whose files were available to him, Chief Justice Hale specifically adverts to 12, including that of Mr. DeFunis, at one point or another in the course of his opinion. (Exhs. 15-19, 21, 22, 24-26, 38.) In addition to Mr. DeFunis,

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7. The dissenting opinion incorrectly states that "some 42 admission files were placed in evidence." (82 Wn.2d 11, 59, Jur. St. A-49.) Exhibits 1-14 were not applicant files except for that of Mr. DeFunis which was entered in two portions as Exhibit 2 and Exhibit 27. (St. 50, 320.)

Actually, it does not appear from the record that most of these files ever were admitted in evidence. All were marked for identification but as far as we can ascertain, only four, in addition to Mr. DeFunis', were admitted. (Exhs. 15, 16, 17 and 18, all admitted at St. 288.)

who of course is discussed throughout the opinion, two of these 12 are referred to twice at different points in the opinion. (Exhs. 18, 24.) In one of these two cases, the opinion does not mention that different aspects of the same file are relied upon at the two separate places in the discussion where it is used to illustrate different points. (Exh. 18.) Thus one would hardly guess that these two following comments, three pages apart in the opinion, in fact refer to the same applicant:

> She recommended, however, against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington. (82 Wn.2d 11, 56, Jur. St. A-46.)
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> * * *
>
> Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his acceptance by letter September 14, 1971, by the dean of the law school. There is apparently very slight correlation in many cases among the GPA, the LSAT, and the writing scores. (82 Wn.2d 11, 59, Jur. St. A-48-49.)

Of these 12 applicants discussed by Chief Justice Hale, three were considered by the committee as minority persons and a fourth was admitted in a prior year and determined to be entitled to automatic readmission under the military readmission rule. (Exhs. 21, 22, 24, 26; St. 349-353.) However, only one of these minority applicants is clearly so identified in the discussion. (Exh. 21, referred to in 82 Wn.2d 11, 58, Jur. St. A-48.) Another of these minority applicants, referred to by Chief Justice Hale at two separate points, can be so identified from the opinion only by inference. (Exh. 24, referred to in 82 Wn.2d 11, 57 and 58, Jur. St. A-46-47, A-48.)

Another minority applicant and the military readmission applicant are not so identified at all. (Exh. 26, referred to in 82 Wn.2d 11, 58, Jur. St. A-48; Exh. 22, referred to in 82 Wn.2d 11, 56, Jur. St. A-46.) The discussion of the numerical academic indicators of these applicants, considered by the

committee pursuant to special policies of admission, along with those of other regular applicants has the effect of accentuating an appearance of inexplicable incongruity in the treatment of applicants by the committee.

Thus the dissenting opinion adverts to only eight applicants admitted by the committee on the basis of parallel comparison rather than under one of the two bases for special admission consideration which the committee recognized.

Two other observations about the nature of this "sample" are in order. The first is that two of the files were of applicants with PFYAs over 77 but were among the relatively few of such high ranking applicants as to whom some substantial concerns arising from initial review led the committee to not admit the individuals earlier but rather to defer the files for consideration along with the pool of applicants in the PFYA 74.5-76.99 range. (Exhs. 15, 25; S. App. 30-31; St. 340, 343.) Almost by definition, therefore, these were exceptional cases and not representative of the applicants generally in the over 77 PFYA range.

The second observation is that six of the eight files are ones which had been assigned to Mrs. Zorn for initial review and reporting to the committee. We can only guess at the reasons which led to the concentration in the dissenting opinion on these files initially reviewed by Mrs. Zorn. Probably, there were several reasons. Chief Justice Hale appears to have been suspicious of the student members of the committee. Of the student members, Mrs. Zorn was the one most extensively examined and cross-examined during the trial. Most important, however, we suspect, was the fact that Mrs. Zorn, more than other committee members, seems to have pursued a consistent practice of writing her comments and preliminary recommendations on the file jackets and initialing them. Of the files identified in the record, the ones reviewed by Mrs. Zorn constituted the largest single group with comments and recommendations noted on the jackets and identifiably traceable to a single committee member. Given Chief Justice Hale's misconstruction of the jacket comments of individual reviewers as if they were expressions of the committee's decisions, these files initially reviewed by Mrs. Zorn yielded the most fertile opportunities for the kind of discussion of illustrative cases upon which the opinion relies to disparage the integrity of the admissions process.

An illuminating example both of Chief Justice Hale's attitude toward the student members of the committee and of his failure to state facts in fair consistency with the evidence in the record is his description of Mrs. Zorn's residency status as follows:[8]

> For example, Tama Zorn, one of the student members who testified, said that she had beecome a member [of the committee] during her first year in law school. Although actually a resident of Washington, D.C., she had been accorded what she described as resident status for tuition purposes on entering law school. (82 Wn.2d 11, 53, Jur. St. A-43.)

The second sentence should be compared with the following dialogue between petitioners' attorney and Mrs. Zorn in the transcript at St. 248-249:

Q (By Mr. Diamond) How long have you resided in Seattle?
A Two years.
Q You reside here with your husband?
A That's right.
Q What does he do?
A He is on the University faculty, at the hospital.
Q In what field?
A He is in ophthalmology research.
Q Before coming to the University of Washington, Mrs. Zorn, were you a resident of the State of Washington?
A Before entering law school?
Q Before coming to the University of Washington.
A Yes.
Q How long had you resided here?
A One year.
Q One year before coming here?
A That's right.

---

8. The point, which would otherwise appear to be irrelevant and minor, had significance in the total pattern of the dissenting opinion because of Chief Justice Hale's emphatic criticism of the Law School for disregarding what he viewed as the natural preferential rights of residents of the State. He described the failure of the Law School to accord an admissions preference to residents of the State as an "invidious form of discrimination" against them. (See 82 Wn.2d 11, 46-47, Jur. St. A-37-38.)

Q You are going to school now?

A That's right.

Q What school are you going to?

A I am going to the University of Washington School of Law.

Q How far along are you in law school?

A This will be my second year.

Q When you first came to the law school, did you come as a non-resident student?

A No, I came as a resident, partially due to the courtesy extended to faculty wives and children of faculty. They are given residency status for the purpose of tuition, but I also would have qualified for residency after having lived here for one year.

Q Where was your home before you came to Washington?

A One year prior to that, we lived in Washington, D.C.

It is clear from her testimony that Mrs. Zorn was a resident of the State of Washington when she entered Law School. Certainly, she was not a resident of the District of Columbia.

The handful of individual cases discussed in the dissenting opinion cannot be viewed as fairly illustrative of the committee's decision making. They are not a representative sample by any stretch of the imagination. Rather, the files of these few applicants appear to have been deliberately selected and the discussion of them carefully tailored to disparage the rationality and consistency of the admissions process.

But the significant fact is that when the files of even these eight applicants (including Mr. DeFunis but excluding the four admitted under the military rule or as minority candidates) and the decisions made with respect to them are analyzed fully and compared fairly, they actually tend to prove the consistency and integrity of the process and to affirmatively disprove the impression of capriciousness conveyed by the dissenting opinion.

The following table ranks these eight applicants by descending PFYA order and shows the recommendation of the initial reviewer and the action of the committee:

Applicant File	*PFYA*	*Initial Reviewer and Comments*	*Committee Actions*
Exh. 15	78.35	Zorn—Defer; Admit	Admitted—May 10
Exh. 25	77.65	Zorn—Wait List "B"	Wait List "B"—May 10; Admitted—July 21
Exh. 16	76.79	Zorn—Wait List "B"	Wait List "B"—May 11; Admitted—July 21
Exh. 17	76.53	Zorn—Wait List	Wait List "C"—May 12; Admitted—Sept. 8
Exh. 18	76.47	Zorn—Deny	Wait List "C"—May 12; Admitted—Sept. 14
Exh. 19	76.36	Zorn—Wait List	Wait List "C"—May 12; Withdrew—Sept. 10[9]
Exhs. 2 & 27 (DeFunis)	76.23	Various—No conclusion expressed	Wait List "E"—May 12; Denied—July 21
Exh. 38	75.96	No comments	Wait List "C"—May 12; Admitted—Sept. 13

Two observations with respect to this array should be emphasized. First, in one of the cases the committee action was different from Mrs. Zorn's recommendation. (Exh. 18.)

Second, except for Mr. DeFunis and the applicant whose file was Exhibit 38, the committee's decisions with respect to the applicants are consistent with the PFYA rank order.

Analysis Of Individual Applicant Files Identified In The Record.

The following portion of this appendix consists of a specific and detailed analysis of the files of each of the applicants (other than Mr. DeFunis) who are mentioned in Chief Justice Hale's dissenting opinion related to the statement in the opinion concerning the applicant. We have identified the individuals by matching the LSAT scores, grade point averages, and PFYA scores with those of the files in evidence. To preserve at least some measure of anonymity, we have omitted reference to the applicants by name.

In the last analysis, if the Court is concerned with the issue, the only way to evaluate whether Chief Justice Hale's terse summaries and characterizations of the decisions made in the

9. An attempt was made to contact applicant by telephone on September 10, 1971, but only his mother could be reached and she indicated that he had already enrolled at another law school and agreed to withdraw his name from the wait list. Hence, technically, he was not ever offered admission. (Exh. 19, sheets 2, 3.) Otherwise, he clearly would have been offered admission on that date.

individual cases he cites are fair is to analyze each of the files fully.

We submit that if these 11 cases are the best evidence that can be produced to demonstrate the capriciousness of the committee's decision making, then the process stands up well under cutting scrutiny. In fact, when the files are analyzed fully and fairly, the decisions made were reasonable and fair.

Exhibit 15

Chief Justice Hale's statement at 82 Wn.2d 11, 57, Jur. St. A-47:

> One admitted applicant showed an almost vertical climb. He had a junior-senior grade point average of 3.64, but an overall grade point average of 2.85. The admission committee notes in his file read as follows: "Overall GPA 2.85. strange recommend. 'arrogant, conceited' but apparently bright . . . [not readable] Take a chance on his screwy personality & admit." His PFYA was 78.35 with a writing score of 71.

The facts:

LSAT 702 Writing Score 71 Jr.-Sr. GPA 3.64 PFYA 78.35 (St. 288, Exh. 15, sheets 2, 26.)

The applicant was admitted by the committee on May 10, 1971, and was so advised by letter dated May 19, 1971. (Exh. 15, sheets 2, 6.) He declined admission to enter active duty in the military due to financial stress. (Exh. 15, sheet 5.)

The "[not readable]" language says "Recommend defer" and is probably of an earlier origin than the comments following. (St. 271.) The statements are correct; that is, the recommendations are unusual and do suggest personal peculiarities. (Exh. 15, sheets 20-22.)

It is not clear what point Chief Justice Hale is making concerning this applicant. The applicant's PFYA was in the very high range but the file had been deferred on Mrs. Zorn's recommendation for consideration in the large pool to be considered by the committee process commencing on May 10. (St. 271, 340.) When it was then reconsidered, Mrs. Zorn recommended admission. (St. 271, 273.) That recommendation was adopted by the committee and the applicant was offered admission but declined in order to voluntarily enter active duty in the armed services for financial reasons. (St. 272-273.)

Exhibit 16

Chief Justice Hale's statement at 82 Wn.2d 11, 55-56, Jur. St. A-45-46:

> There is also a curious aura of civil, political or community "activism," as it is sometimes called, surrounding the recommendations for admission or rejection. One student applicant recommended by Mrs. Zorn had an LSAT of 562, substantially lower than the average of Mr. DeFunis, but was recommended for the waiting list because of being very active on campus and in his community. The activity which impressed her the most was that he was a founding member of Isla Vista Branch of the American Civil Liberties Union and president of its student chapter at the University of California, Santa Barbara. He had participated in the John Tunney for Senate campaign in California and in the operation of a student owned and operated radio station in Santa Barbara. Also, the applicant had been a campus news reporter and a member of several other campus organizations. Mrs. Zorn had concluded that these activities, despite the low LSAT, established sound basis for admission to the law school.

The facts:

LSAT 562 Writing Score 71 Jr.-Sr. GPA 3.83 PFYA 76.79 (St. 288, Exh. 16, sheets 2, 24.)

The committee placed the applicant on the "B" waiting list on May 11, 1971, and he was so advised on May 21, 1971. (Exh. 16, sheets 2, 10.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23. (Exh. 16, sheets 2, 7.) Applicant declined the offer of admission. (Exh. 16, sheets 2, 3.)

This file illustrates the manipulation of the facts by the dissenting opinion by shifting between emphasis on the grades, the LSAT and the PFYA. Here the LSAT was on the low side but the grades were very high and the PFYA was on the high side of the mid-range group, a 76.79. Chief Justice Hale mentions only the low LSAT. Indeed, in this respect the disregard of the obvious comparison with Mr. DeFunis himself is interesting. Mr. DeFunis was also on the low side as to the LSAT but had high grades, the differential being somewhat less and the operation of the formula such that Mr. DeFunis had a

lower PFYA. Thus, Mr. DeFunis had a 582 LSAT, a 3.71 Jr.-Sr. GPA and a 76.23 PFYA.

Chief Justice Hale fails to mention that Mrs. Zorn's recommendation and the committee decision were to place the applicant in the high waiting list range, rather than to admit outright, and he was subsequently admitted from the waiting list.

Finally, the inference which Chief Justice Hale conveys that Mrs. Zorn was primarily influenced by the applicant's activities rather than his academic potential is questionable. All but one of the rather extensive comments written on the file jacket by Mrs. Zorn relate to the prediction of academic potential. The comments are as follows:

> "LSAT represents two times at bat with no improvement—Good grades & high writing score—recommend. exceptional—waiting list—TZ"
>
> "Poli Sci prof says he was the outstanding student in an upper division seminar—very active on campus and in the community. We don't have all his senior grades but his junior year was a straight 4.0 & includes several poli sci courses as well as a 'senior seminar' in poli sci. I'd go with the GPA on this one & accept him."

(Exh. 16, sheet 2.)

In response to questioning by petitioner's counsel, Mrs. Zorn recited the activities which led her to make the comment that the individual was "very active on campus and in the community" and the observation seems to have been well justified. (St. 282-283.) This applicant was in the middle range where other factors were considered in making selections. Mrs. Zorn legitimately considered the evidences of substantial community activity as a favorable factor. Her testimony makes it clear that she was interested in the fact of demonstrated commitment to community centered efforts and not in the nature or political orientation of the activities. (St. 283-285.)

Exhibit 17

Chief Justice Hale's statement at 82 Wn.2d 11, 59, Jur. St. A-48:

> Another applicant admitted with a junior-senior grade point average of 3.56 had an LSAT of 625. Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: "Enthusiastic recommendation. Abundant community action projects."

The facts:

LSAT 625 Writing Score 64 Jr.-Sr. GPA 3.56 PFYA 76.53 (St. 288, Exh. 17, sheets 2, 22, 26.)

The committee placed applicant on the "C" waiting list on May 12, 1971, and he was so advised by letter dated May 21, 1971. (Exh. 17, sheets 2, 7.) He was admitted from the waiting list September 8, 1971, and so advised by telephone September 10, 1971, but declined. (Exh. 17, sheets 2, 3.)

This case illustrates several of the misconceptions about the selection process which permeate the dissenting opinion.

First, there is the erroneous reliance upon the jacket comments of the committee member who first reviewed the file as indicative of the bases for the committee decision. The reviewer was Mrs. Zorn and her initial comment was:

> "Enthusiastic recommend."
>
> "Abundant community action projects—Admit TZ"

The word "Admit" is struck through and the next line is "Wait C."

Then the next comment, also in Mrs. Zorn's hand, is:

> "recommend varied sources—Congressman Meeds, etc. all positive and enthusiastic, local boy abundant community service, ACLU in this state, legislative committee on Indian Affairs in D.C.—active, apparently committed young man"
>
> "recommend accept."
>
> (Exh. 17, sheet 2.)

Actually, it appears that Mrs. Zorn's eventual recommendation and the committee decision on May 12, 1971, was to place applicant on the "C" waiting list and that a subsequent decision to admit from that list was made September 8, 1971. (St. 283, Exh. 17, sheets 2, 3, 7.)

Second, the statement "Despite these high qualifications, the determining factor for admission here as revealed in the file is the remark on the admissions council list: 'Enthusiastic recommendation, Abundant community action projects'" is a debatable one. The academic indicators appeared on the face of the file jacket so there would be little reason to repeat them in written comments. The phrase on the file "enthusiastic recommend" apparently refers to the several letters of recommendation in the file. (Exh. 17, sheets 17, 18, 19, 20, 21.)

The applicant was in the high end of the range from which discretionary selections were made and these other factors such as recommendations and outside activities admittedly played a part in those cases. Yet, if anything, the decision to place on the "C" waiting list in the first instance shows the relatively minor weight attached by the committee to these factors whatever may have been Mrs. Zorn's inclinations. (St. 283-285, 360.)

Finally, the comparison between this applicant and Mr. DeFunis tend to support the reliability of the committee process in this area of numerous applicants with closely compacted academic indicators. This applicant had a 76.53 PFYA, strong recommendations and strong activities. He was on the "C" waiting list. Mr. DeFunis had a 76.23 PFYA, weaker recommendations and less outside involvement and was placed on the "E" waiting list.

The applicant declined the late offer of admission. (Exh. 17, sheets 2, 3.)

Exhibit 18

Chief Justice Hale's statements at 82 Wn.2d 11, 56 and 59, Jur. St. A-46 and A-48-49:

> She [Mrs. Zorn] recommended, however, against the admission of another student with a 3.9 junior-senior grade average because she did not think that his area of study, the field of finance, adequately significant. Finance, as she put it, was a program without rigor. She was apparently unaware of the rigorous nature of courses in accountancy, statistics, economics and banking as taught at the University of Washington.
>
> * * *

> Another applicant earned a remarkably high junior-senior GPA of 3.90 and scored 599 in the LSAT, but achieved a writing score of only 46. He was notified of his acceptance by letter September 14, 1971, by the dean of the law school. There is apparently very slight correlation in many cases among the GPA, the LSAT and the writing scores.

The facts:

LSAT 599 Writing Score 46 Jr.-Sr. GPA 3.90 PFYA 76.47 (St. 288, Exh. 18, sheets 2, 12, 15.)

The committee placed applicant on the "C" waiting list on May 12, 1971, and he was so advised by letter dated May 21, 1971. (Exh. 18, sheets 2, 6.)

He was admitted from the waiting list on September 13, 1971, and so advised by letter dated September 14, 1971. (Exh. 18, sheets 2, 3; St. 287.)

Chief Justice Hale refers to this applicant at two separate points in the dissenting opinion without disclosing that the two references are to the same person.

Also, the opinion does not mention the fact that the committee action was contrary to Mrs. Zorn's recommendation, which was to deny. Thus, Mrs. Zorn's comments were:

> "That 3.9 does not appear significant in light of courses taken—don't know UW Finance program but it does not appear to me that he took a program of any rigor." [The balance of the comments following were apparently made at the time of committee action.]
>
> "Waiting C"
>
> "I still go with above and think LSAT valid indicator."
>
> (Exh. 18, sheet 2.)

Mrs. Zorn's testimony was that she was not familiar with the finance program at the University, that being an English and History major, she was in ignorance as to the values of accounting courses, that under these circumstances she wished to bring the question to the attention of the faculty members of the committee who read the transcript and made a perhaps better informed judgment as to the rigor of the courses. (St. 285-287.)

Exhibit 19

Chief Justice Hale's statement at 82 Wn.2d 11, 59, Jur. St. A-49:

> An applicant with a GPA of 3.55 was notified of his acceptance by the law school by letter of May 21, 1971, from the associate dean after achieving an LSAT of 625 and a writing score of 61. For some reason or other, the admissions committee recommended against outright admission but that he be placed on the waiting list. Despite this, however, the applicant was categorically admitted.

The facts:

LSAT 625 Writing Score 61 Jr.-Sr. GPA 3.55 PFYA 76.36 (Exh. 19, sheets 2, 29, 30.)

The statement in the dissenting opinion as to this applicant is inexplicable. The committee decided on May 12, 1971, to place him on the waiting list and he was so advised by letter from Dean Hunt dated May 21, 1971. (Exh. 19, sheets 2, 6.) Actually no admission offer ever was thereafter made to him. In September when the Admissions Secretary sought to contact him by telephone to ascertain if he wished to be admitted from the waiting list, she reached his mother instead who advised that he had enrolled elsewhere and agreed that he be withdrawn from the waiting list. (Exh. 19, sheet 3.)

Exhibit 21

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> By letter of March 2, 1971, an applicant with a junior-senior grade point average of 2.89, an LSAT of 663 and a writing score of 58 was accepted. Other than pointing out that the applicant was a member of a minority, the admissions council was noncommital.

The facts:

Minority applicant LSAT 663 Writing Score 58 Jr.-Sr. GPA 2.89 PFYA 74.52 (Exh. 21, sheets 2, 11, 17.)

The applicant was admitted by the committee February 24,

1971, and so advised by letter dated March 2, 1971. (Exh. 21, sheets 2, 7.)

The dissenting opinion is directly in error in the statement that the admissions committee was "noncommital." The space for "accept" on the file jacket shows the date stamp of committee action—February 24, 1971—and there are comments on the jacket though none express a recommendation. (Exh. 21, sheet 2.) The applicant did not enter. (Exh. 21, sheets 3, 4.)

Exhibit 22

Chief Justice Hale's statement at 82 Wn.2d 11, 56, Jur. St. A-46:

> Testifying concerning one applicant whose junior-senior grade point average was only 2.89, a comparatively low grade, he [Mr. Hayes] acknowledged, that applicant's file cover contained the statement entered by a committee member, "We seem to have bungled this one pretty conclusively. He's got us." The committee, having mistakenly accepted that applicant, he said, did not rectify the error and the particular applicant remained admitted.

The facts:

The foregoing characterization of the circumstances is misleading based upon the facts as disclosed by documents in the file and by the testimony. (St. 395-396.)

The applicant had first applied for and been admitted to the class entering in September, 1968. He accepted, enrolled, and attended for a short time during the orientation period. Due to the escalation in the size and quality of the applicant pool in intervening years, he probably would not have been admitted in 1970 or 1971 except under the military readmission rule. On September 23, 1968, he saw Professor Andersen, then Associate Dean, to shift his enrollment to the Graduate School for graduate work in the English Department, pending anticipated induction into the military service. Dean Andersen approved the appropriate "Change of College" form.

Apparently, there was some difference in understanding between the applicant and Dean Andersen as to the operative reason for the applicant's withdrawal from the Law School at

that time. (St. 395.) Dean Andersen's contemporaneous memorandum to the file dated September 23, 1968, states:

> Mr. [Blank] was in today to have me sign a Change of College form. He has decided that he prefers to do graduate work in English to coming to Law School. Since apparently he had initially planned to come to Law School only until his acceptance in the graduate school was final, I do not think he qualifies for automatic readmission after the military service which, as a 1-A draft registrant, he may soon undergo. (Exh. 22, sheet 26.)

In 1970, anticipating possible early release from the Army, the applicant sought readmission to the Law School class entering in Autumn, 1970. In a letter written at that time, the applicant described the circumstances of his earlier withdrawal as follows:

> I was accepted into the School of Law at the University of Washington for the autumn term, 1968. Two days into orientation week, I was informed by my draft board that my appeal of my 1-A classification had been turned down, and that my induction was imminent. Realizing that I would not be able to complete a full year of law school before I was drafted, I withdrew from law school and entered the graduate school of the University of Washington, where I completed one quarter before I was drafted. (Exh. 22, sheet 15.)

Note the difference in interpretation by the two individuals as to the operative reason for withdrawal from the Law School and shift to the Graduate School in English in 1968.

The applicant was advised by the Admissions Secretary of the Law School, on March 27, 1970, that he could renew his application by bringing the file up to date but that he would be competing for a place in the entering class with all other applicants and that he was not entitled to automatic readmission. (Exh. 22, sheet 13.)

The applicant was unable to obtain early release but wished to secure admission in the class to enter in September, 1971. He wrote the Admissions Secretary as follows in a letter received April 20, 1970:

> Thank you for your recent communique, RE: readmission to law school, fall of 1970. Unfortunately, I will not be

> able to get an early release from the Army, therefore I plan to use the forms you enclosed for my fall of 1971 application. Your efforts were most appreciated.
>
> I would like to find out, for future reference, why I would not be able to be readmitted under the provisions of section 3, All students, *Readmission after withdrawal*. I feel I meet those qualifications. (Exhibit 22, sheet 12.)

Dean Andersen undertook to respond negatively to the inquiry in the second paragraph of the above quoted letter but upon reflection felt that he may not have made it clearly evident to the applicant in 1968 that the circumstances of the withdrawal as then understood by Dean Andersen would not entitle the applicant to later readmission under the military rule. He therefore concluded that the applicant equitably should be readmitted in 1970. A handwritten note in the file by Dean Andersen dated May 3, 1970, states:

> I have tried drafting a response to this but it just won't "write." I'm afraid I should have given him a letter in 1968 with my conclusions in it, which would have estopped him from making the claim he now makes. We have no legitimate way of establishing on our record that he didn't do what he did for the reasons he now states and, on those reasons he is entitled to readmission. Sorry.
>
> WRA
>
> (Exh. 22, sheet 11.)

By letter dated June 4, 1970, the applicant was advised by the Admissions Secretary that "After discussing your situation with Dean Andersen, I have determined that you are entitled to automatic readmission for Autumn Quarter, 1971." (Exh. 22, sheet 10.)

That decision was carried out and reaffirmed when the applicants for 1971 were considered during the review process. See the file note by the Admissions Secretary dated December 31, 1970, and the letter to the applicant from Dean Hunt dated March 2, 1971. (Exh. 22, sheets 9 and 7.)

Whatever may have been the tenor of Professor Crooks' comment on the file jacket (St. 301), it scarcely seems appropriate to criticize the Law School for having bent over back-

wards to treat the applicant fairly in a case of apparent misunderstanding as to the effect of the earlier withdrawal on the application of the military readmission rule. It clearly is not a case in which the admissions committee "mistakenly accepted that applicant" and then failed to "rectify the error" as Chief Justice Hale states.

Exhibit 24

Chief Justice Hale's statement at 82 Wn.2d 11, 57 and 58, Jur. St. A-46-47 and A-48:

> The committee, he [Mr. Hayes] said, was trying to achieve what he described as a class balance based on an estimated potential for getting through school. He said most of the files given him for review were those of minority students. Another applicant he recommended for admission had a junior-senior grade point average of only 2.63 with the notation, "Excellent recommendations, sound record. Divorced with five kids. Could make it if her personal situation could be worked out, lightened load possibility? Admit."
>
> * * *
>
> Another young woman, earlier alluded to, was admitted to the law school with a junior-senior grade point average of 2.63, an LSAT of 481, and a writing score of 55. The file shows that she was 35 years of age at the time of admission and would thus be 38 upon graduation, if indeed able to complete the program on schedule. The remarks entered by the admissions council in her file note that she was "Divorced with five kids. Could make it if her personal situation could be worked out." It added, "Excellent recommendations; sound record," and upon these conclusions recommended admission to the law school.

The facts:

Minority applicant LSAT 481 Writing Score 55 Jr.-Sr. GPA 2.63 PFYA 70.60 (Exh. 24, sheets 2, 35.)

The applicant graduated from California State College at Hayward. (Exh. 24, sheet 22.)

She was admitted May 25, 1971, by the committee conditional on satisfactory completion of the CLEO Institute conducted that year at the University of California at Davis. (Exh. 24, sheets 2, 14; St. 394.) She completed the CLEO program with very good evaluations of her performance (Exh. 24, sheets 10, 11.) and was admitted August 26, 1971. (Exh. 24, sheets 2, 4.)

As the opinion mentions, she was 35 years old, divorced, with five children. (Exh. 24, sheet 22.) She worked extensively while an undergraduate and was plagued by illnesses. For one year in upper division, she worked an eight hour shift, 11 p.m. to 7 a.m., as a nurse's aide. (Exh. 24, sheets 22, 27-29, 30.) She was strongly oriented toward service to the minority community. (Exh. 24, sheets 27-29, 30-31.)

The recommendation letters were very strong. (Exh. 24, sheets 24, 25, 26-29, 30-31.)

Given the objectives of a special minority admissions policy, based upon the complete file before the committee she was a good prospect. Considering her background and the handicaps confronting her, the applicant had displayed great initiative, self-discipline and capability in completing college.

Exhibit 25

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> Another applicant with a junior-senior GPA of 3.32, an LSAT of 759, and a writing score of 60 was admitted by letter of July 23, 1971, from the associate dean of the law school despite the admissions committee's remarks set forth in his file that his "recommendations are equivocal and his academic career unimpressive." The admissions council deemed unimpressive a 3.32 junior-senior average earned in chemistry, physics, analytical geometry, calculus and general physics laboratory. This particular applicant with the so-called unimpressive academic record had also earned 6 hours of A in advanced calculus, 6 hours of A in mechanics and an A in introduction to digital computers.

The facts:

LSAT 759 Writing Score 60 Jr.-Sr. GPA 3.32 PFYA 77.65 (Exh. 25, sheets 2, 20, 23.)

The committee placed applicant on the "B" waiting list on May 10, 1971, and he was so advised on May 21, 1971. (Exh. 25, sheets 2, 8.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23, 1971. (Exh. 25, sheets 2, 5.)

The full comments on the file, all apparently by Mrs. Zorn except the last paragraph which seems to be in other handwriting, and apparently written at different times are as follows:

"4/26

"Waiting List—B TZ"

"On reconsidering, the floating and unsuccessful attempts at law & physics & a fairly unconvincing personal statement put him below my other B's in spite of good numbers."

"His recommendations are equivocal and his academic career unimpressive."

"Not sure about interest already tried law and found uninteresting."

"Physics success limited."

(Exh. 25, sheet 2.)

Apart from everything else, the comments are in the range of fair inference from the file. The applicant had received an A.B. degree in History from Stanford in June, 1962, and then started law school at Stanford but dropped out toward the end of the first quarter. (Exh. 25, sheets 12, 14, 17.)

He then attended San Jose State for a semester in 1963 and the University of Washington from September, 1963, to December, 1968, receiving a Master of Science in Physics in March, 1969. (Exh. 25, sheets 12, 23.) He was admitted to the graduate program in Physics in March, 1966, having pursued a preparatory upper division program in Physics prior to that time. (Exh. 25, sheets 16, 28, 29.) Though his performance at the undergraduate level was good (Exh. 25,

sheets 16, 28, 29), his performance in the graduate program was weak, he was consistently on either academic warning or probation, and finally was asked to discontinue graduate studies in Physics after completing work for the Masters degree. (Exh. 25, sheets 16, 30.)

Mrs. Zorn fairly characterized the academic record and the recommendations. (Exh. 25, sheets 16, 23.)

Chief Justice Hale's recital of courses in which the applicant earned A's could have been matched by the following: "Applicant earned C's in 3 hours of Elementary Probability, 3 hours of Matrices, 5 hours of Quantitative Analysis, 3 hours of Topics in Applied Analysis, and 3 hours of Electricity and Magnetism." (Exh. 25, sheets 28, 29.)

Exhibit 26

Chief Justice Hale's statement at 82 Wn.2d 11, 58, Jur. St. A-48:

> An applicant with a junior-senior GPA of 2.37 and an LSAT score of 475, was admitted by letter from the associate dean dated July 29, 1971, despite the remarks of the admissions committee that he be rejected.

The facts:

Minority applicant LSAT 475 Writing Score 24 Jr.-Sr. GPA 2.37 (Exh. 26, sheets 3, 11, 14, 15.)

The committee placed him on the waiting list on May 26, 1971, and he was advised of this action by letter dated May 28, 1971. (Exh. 26, sheets 3, 9.) He was admitted from the waiting list by the committee on July 21, 1971, and was so advised by letter dated July 23, 1971. (Exh. 26, sheets 3, 6.)

The applicant had applied the year before with an LSAT of 445 and had been rejected. (Exh. 38, sheets 27, 36 and 19.) He attended the CLEO Institute at the University of Washington in the early summer of 1970 and satisfactorily completed it. (Exh. 26, sheets 30 and 31.) He retook the LSAT in December, 1970, and received a score of 505 which was averaged with the earlier score to yield the 475 LSAT. (Exh. 26, sheets 14 and 15.)

The "remarks of the admissions committee that he [the ap-

plicant] be rejected" to which Chief Justice Hale refers are the following from the year before:

"4/26/70"

"He reports his LSAT to CLEO as 445, 28, 40."

"He applied to Northwestern and I think he might be better off there. Reject—G.C." (Exh. 26, sheet 2.)

Exhibit 38

Chief Justice Hale's statement at 82 Wn.2d 11, 57-58, Jur. St. A-47:

> One cannot discern from the files whether a heightened community or campus activity, or whatever, constituted the determining factor for admission. One young woman with a junior-senior GPA of 3, an LSAT of 702, and a writing score of 66, was admitted by a letter from the dean dated September 14, 1971, with no comment, remark or recommendation whatever from the admissions council.

The facts:

LSAT 626 Writing Score 66 (Exh. 38, sheets 2, 20.)

The GPA and the PFYA were the subject of recomputation. It was first computed as 74.69 (Exh. 38, sheet 19.) based on an apparent 3.0 average for 8 semester hours at Portland State in 1970 and four semester hours at Reed in 1970. Two prior years with full loads had been at Reed, *i.e.*, 1968-69 with 28 semester hours and 1969-70 with 36.0 semester hours. (Exh. 38, sheet 20.) The Portland State work was in summer session and the four hours work at Reed would have been just the beginning of the 1970-71 academic year work at Reed, aggregating only 12 hours in total. Hence, the GPA was recomputed employing the small amount of third year work at Reed, the summer session work at Portland State and the 36 hours of work in the applicant's second year at Reed. This yielded a GPA of 3.36 and a PFYA of 75.96. (Exh. 38, sheet 18 and sheet 2.)

The applicant was placed on the "C" waiting list by the committee on May 13, 1971, and was so advised by letter dated May 21, 1971. (Exh. 38, sheets 2, 8.) She was admitted from the waiting list on September 13, 1971, and was so ad-

vised by letter dated September 14, 1971. (Exh. 38, sheets 2, 3.)

The dissenting opinion erroneously states the LSAT score as 702. In fact it was 626.

CONCLUSION

Chief Justice Hale's distorted perception of the results of the admission selection process is perhaps best exemplified by the following statement from his dissenting opinion:

> Of the approximately 150 students actually enrolled in the class for which petitioner DeFunis made his application, only some 42 admission files were placed in evidence. But an inspection of these files, in my judgment, fails to show any consistent policy on admissions at which a prelaw student could aim his career. If he is intelligent, works hard, and achieves high grades, his place in the law school class may be preempted by someone with lesser grades but who is engaged in what is described as "community activities," or is otherwise described as a student activist. Or, if he is engaged in community activities and still attains high grades through diligence and intelligence and long hours at the books, his position may be taken in the entering class by one who has neither engaged in "community activity" nor achieved high grades but, nevertheless, has made a high LSAT score. Or, even if he studied hard, is intelligent, and placed high in grades, LSAT and PFYA, and engaged in what are called community activities, his place might still be awarded to a minority student who has done none of these. All of these inequities are, I fear, bound to foster a spirit of anti-intellectualism in the heart of what should be an intellectual center. (82 Wn.2d 11, 59-60, Jur. St. A-49.)

On the record, this interpretation is unjustified. It took a combination of high grades, high LSAT scores and other evidences of great academic potential to secure admission. The extra-curricular and community activities and work history of applicants played a role in the selection decisions only as among applicants relatively closely placed in the marginal range. Moreover, whatever displacement of applicants that occurred by reason of the special minority admissions program also was in that range and not in the area of the most highly qualified applicants.

APPENDIX B

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Appellants-Petitioners,

v.

CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES-RESPONDENTS' MEMORANDUM ON THE QUESTION OF MOOTNESS

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October 31, 1973

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
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v.

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Appellees-Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

APPELLEES-RESPONDENTS' MEMORANDUM ON THE QUESTION OF MOOTNESS

This memorandum is submitted on behalf of the appellee-respondents in response to the request of the Court received in this office on October 25, 1973, to express the views of counsel on the possibility of mootness of this case.

STATEMENT OF FACTS RELEVANT TO THE QUESTION OF MOOTNESS*

Appellants-Petitioners (hereafter referred to as DeFunis)

* Due to time restrictions, references are not made to the transcript of record on appeal but counsel believes and asserts that the record will support the statement of facts set forth except where recent events are referred to or as otherwise indicated in the text.

commenced an action in the King County Superior Court on August 18, 1971, naming the appellees-respondents (hereafter referred to as the university), in which DeFunis asked the court to order the university to admit and enroll him in the university's law school for the fall of 1971. Following preliminary motions and limited discovery, the case was tried by Judge Lloyd Shorett of that court on September 14, 1971. A preliminary injunction had been issued prior to the trial, holding a place open which could be filled by Mr. DeFunis should the relief he was seeking be granted. The trial of the matter took approximately three days and the opinion of the court was rendered on the following Wednesday, September 22, 1971. Pursuant to the opinion of the court, Mr. DeFunis was enrolled in the law school class commencing the fall of 1971. Classes had just commenced the preceding Monday, September 20, 1971. The formal entry of judgment and findings of fact and conclusions of law by Judge Shorett were entered on October 18, 1971. On October 21, 1971, the university filed and served its notice of appeal. The matter was appealed directly to the Supreme Court of the State of Washington since it involved "fundamental and urgent issues of broad public import requiring prompt and ultimate determination." Washington Supreme Court Rules on Appeal I-14.

There was no delay in the appeal process and the matter was argued before the Washington Supreme Court on May 15, 1972. The opinion of the Washington Supreme Court was filed on March 8, 1973, and the attorneys for DeFunis promptly filed their petition for rehearing which was denied without argument by that court. Mr. DeFunis' appeal to this Court was filed shortly thereafter. The only delay here was occasioned by a short extension of time to the university to file its motion for affirmance or dismissal, occassioned by the *amicus* brief in support of appellants consented to by the parties.

DeFunis has continued his progress in the law school working toward his Juris Doctor degree and is presently in the first quarter of his last year. The law school program at the university is a three-year program which could in exceptional cases be accelerated by attendance during summer quarters. Mr. DeFunis has not attended during the summer quarters and if his present progress were to continue as it has in the past, he would complete his course work and presumably be awarded his Juris Doctor degree at the end of the spring quarter on June

14, 1974. Registration for his final quarter at the University of Washington will occur between the period of February 20, 1974, and March 1, 1974. These facts are not contained in the record but are taken from the University of Washington's published catalog for the academic year 1973/74.

During the oral argument of this matter before the Washington State Supreme Court, one of the justices of that court inquired of counsel for the university whether or not he believed the case was then moot (May 15, 1972). While that oral argument was not transcribed and is not a part of the record before this Court, the answer to that inquiry by the university's counsel was substantially as follows:

> "I do not believe the matter is moot. Mr. DeFunis remains in law school because of an order of the superior court which is now on appeal to this court and not by reason of the exercise of the discretion vested in the board of regents of the University of Washington and, through it, in the law school of the University of Washington. If that discretion is restored to the university and its law school, as we believe this court should do by reversing the lower court, the university would then consider Mr. DeFunis' application for enrollment upon the merits as they then stand, which means upon his probability at the time of consideration of successfully completing his law school education at the university."

The above response is the short answer to this Court's question concerning mootness now, since all the facts operative on May 15, 1972, are operative now (October 31, 1973).

If the decision of the Washington State Supreme Court is permitted to stand, Mr. DeFunis would have to take some appropriate action to request continued admission for the remainder of his law school education, and some discretionary action by the university on such request would have to be taken. Counsel is advised by the Dean of the law school (and we both believe that this Court should be advised) that even if discretion with respect to the continuance of Mr. DeFunis' admission to the law school is returned to the university by final termination of this litigation prior to his registration for a final quarter of study, it would be most unlikely that the university would make a decision preventing him from completing the balance of his course of study for the J.D. degree. Counsel

is further advised by the Dean of the law school (and we believe this Court should be advised) that if Mr. DeFunis registers for the spring quarter under the existing order of this court during the registration period from February 20, 1974, to March 1, 1974, that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation.

POSITION OF THE UNIVERSITY

The university urges dismissal of this appeal or, in the alternative, affirmance of the judgment below and denial of certiorari for the reasons set forth in its Motion of Dismissal of Appeal or, in the Alternative, Affirmance of the Judgment Below and Statement in Opposition to Certiorari filed with this Court. In that motion, the university did not urge the dismissal of this appeal on the grounds of mootness, and it does not now urge the dismissal of this appeal on the grounds of mootness for the reason that the matter is not moot.

ARGUMENT

1. *The Case is not Moot*

We understand the doctrine of mootness to be based on Article III, § 2, U. S. Constitution, which sets forth the jurisdiction of this Court and other federal courts and confines that jurisdiction to certain cases and controversies. *Liner v. Jafco, Inc.* 375 U.S. 301, 306 n.3, 11 L. Ed. 2d 347, 351, 84 S. Ct. 391 (1964). This Court has defined such a "case" or "controversy" as one which

> "[M]ust be definite and concrete, touching the legal relations of parties having adverse legal interests .... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical statement of facts." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-241, 81 L. Ed. 617, 621, 57 S. Ct. 461 (1937).

The constitutional doctrine of mootness is summarized in this Court's opinion in *North Carolina v. Rice,* 404 U.S. 244, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971).

This case is not moot because if the appeal is dismissed or the judgment below is affirmed, as the university has urged in its motion, Mr. DeFunis will be required to re-apply for admission to complete his law school education at the University of Washington law school, and the University of Washington will have to exercise its lawful discreton in acting on that request. This will be true at least until February 20, 1974. Thus, the decision of this Court can affect the rights of the litigants, there remains a concrete controversy that has been presented in an adversary context, and the action is based on real not hypothetical facts. *Sibron v. State of New York*, 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (1968). This Court, while not explicitly basing its holding thereon, stated as follows:

> "None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case. There is nothing abstract, feigned, or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the 'impact of actuality' to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act." *Sibron*, 88 S. Ct. at 1900.

The recent comment in 84 Harv. L. Rev. 1972 explores the Court's statement in some depth and concludes that such an argument is essentially sound.

2. *This Case Falls within the Exceptions to the Mootness Doctrine Developed by this Court*

This Court recently discussed exceptions to the mootness doctrine in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) where, after discussing the general doctrine, it stated:

> "But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termina-

> tion makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.'" *Wade*, 93 S. Ct. at 713.

While the facts in *Wade* are different from those in this case, and it certainly takes longer to complete a law school education than it does to complete a pregnancy, this case illustrates the possibility that it may well take longer to commence a case in a state trial court and follow it through to final resolution by review and disposition by this Court than it takes to complete a three-year law school education.

While it is possible that the important constitutional issues raised in this appeal can be resolved before the case becomes moot, particularly if the plaintiff were unsuccessful at the initial stage of the proceedings, it is improbable. Such a plaintiff, in all probability, would seek admission elsewhere, or decide on a different career, rather than wait out the long and expensive appellate process which would delay his legal education for at least two years.

There can be do doubt that the case raises important constitutional questions and that the actions complained of here will be repeated, though admittedly not to Mr. DeFunis. Thus, if the Court were to adhere to a narrow construction of the exceptions in *Wade*, it would follow that the mootness exception would not apply in this case if, in fact, it were moot. In *Moore v. Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493 L. Ed. 2d 1 (1969), this Court ruled on the constitutionality of certain election procedures in Illinois where there is need for resolution of a "continuing controversy" even though the matter had become moot as to the particular parties involved, citing *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 31 S. Ct. 279, 55 L. Ed. 310 (1911) which this Court also cited in *Wade*. But, the *per curiam* opinion in *Hall v. Beals*, 396 U.S. 45, 24 L. Ed. 2d 214, 90 S. Ct. 200 (1969) arguably limits the *Moore* holding to those cases capable of repetition to the *same* parties and evading review. Mr. Justice Brennan and

Mr. Justice Marshall, dissenting, expressed their conviction that the Court had too narrowly construed the opinion in *Moore*. We note, however, that in its recent unanimous decision in *Brown v. Chote*, 93 S. Ct. 1732, — L. Ed. 2d —, — U.S. — (1973), the exception is stated in the more general term that "the question raised is one 'capable of repetition, yet evading review.' Consequently the case is not moot." 93 S. Ct. at 1736, n.4.

We believe the significance of the issues in this case would justify adherence to the broader interpretations of the exception to the mootness doctrine should the Court be convinced that the case is, in fact, moot.

CONCLUSION

The university respectfully urges the Court to grant its Motion for Affirmance or Dismissal for the reasons set forth in its motion before this Court, but not on the grounds of mootness since the case is not, in fact, moot and, if it were, it would fall within the exception to the doctrine expressed in *Roe v. Wade, supra.*

Respectfully submitted,
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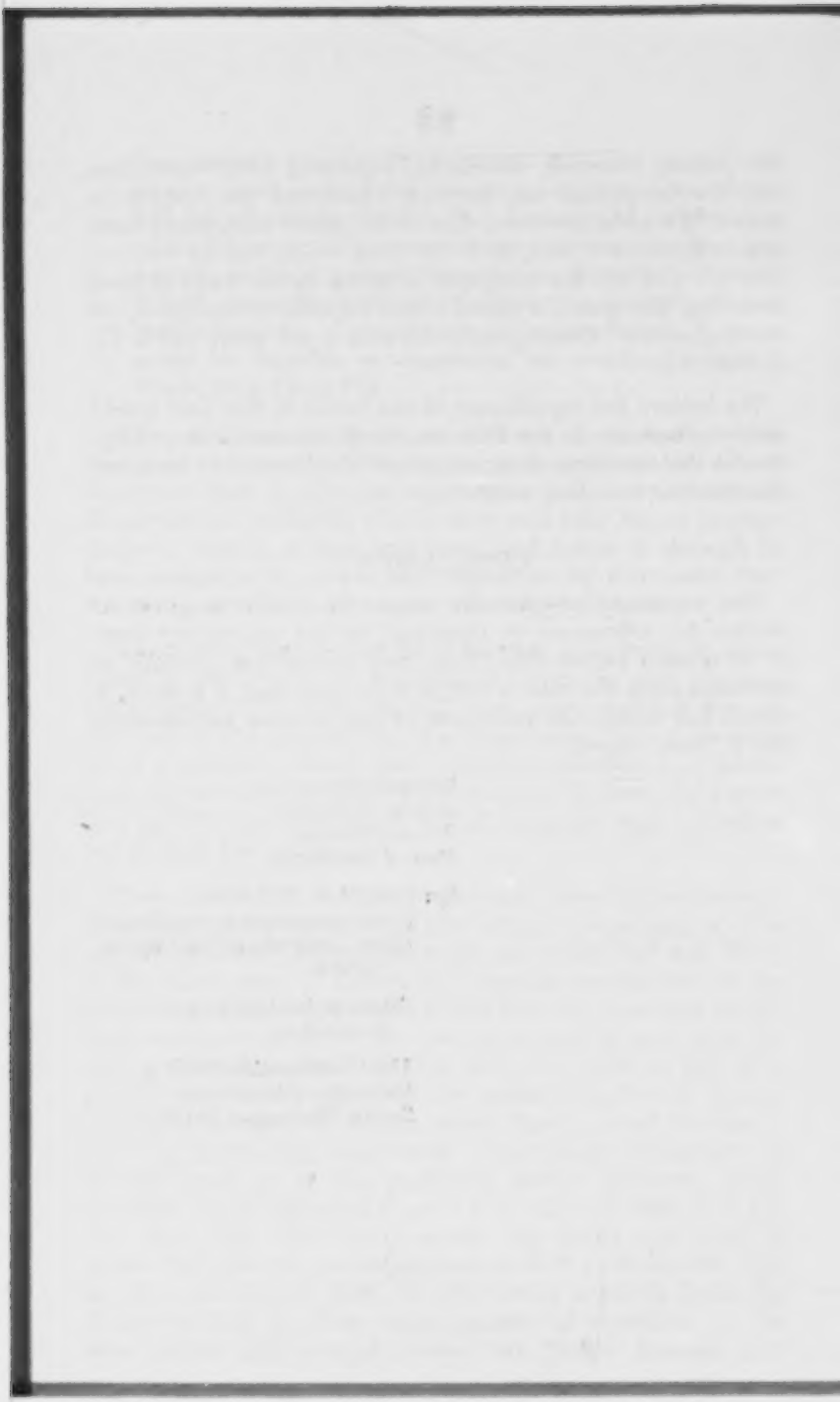

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IN THE
Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DeFUNIS and BETTY DeFUNIS, his wife;
MARCO DeFUNIS, JR. and LUCIA DeFUNIS, his wife,
Plaintiffs-Appellants,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK C. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,

Defendants-Respondents.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONER'S MEMORANDUM ON MOOTNESS

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IN THE
Supreme Court of the United States
October Term, 1973

MARCO DeFUNIS and BETTY DeFUNIS, his wife; MARCO DeFUNIS, JR. and LUCIA DeFUNIS, his wife,

Plaintiffs-Appellants,

vs.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,

Defendants-Respondents

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

NO. 73-235

PETITIONER'S MEMORANDUM ON MOOTNESS

Petitioner, Marco DeFunis, Jr., is presently in the University of Washington Law School only by reason of an outstanding order of the Superior Court of the State of Washington which has been kept in effect by the stay entered herein by Mr. Justice Douglas.

Attached hereto as Appendix I* is a correct copy of the Judgment of the Superior Court by which he is now in school.

If the Petition should be denied, the injunction and stay would cease to be effective and there is nothing that would prevent the University from terminating his enrollment.

* [Omitted from this Appendix B.]

This is not an empty fear. When the state court decision was rendered, Mr. DeFunis was requested by the University to submit a request, to be acted upon by the faculty, for permission to remain in law school. It was only the stay issued by this court that relieved him of the necessity of submitting to this procedure.

The law school course takes three years for completion.

While this case has been pending Mr. DeFunis has completed the first two years of the course. The third year has just commenced and will not be completed until June of 1974.

We note that on Page 7 of Appellees' Motion to Dismiss or Affirm, the note at the bottom of the page makes the statement that:

> "Assuming his present rate of progress he will complete his third year and be awarded his JD degree at the end of the 1973/74 academic year regardless of the outcome of this appeal."

Appellant has no assurance that he will be permitted to finish the present academic year regardless of the outcome of this appeal. If the present application is denied there will be nothing to prevent the University from reverting to its original position that he is not entitled to be in law school.

Appellant knows no basis for the statement in the footnote in respondents' brief that Mr. DeFunis will be allowed to remain in school until the end of the 1973/74 academic year and be awarded his JD degree regardless of the outcome of this appeal.

A mere statement by a party that he will not engage in the conduct enjoined is not basis for making a case moot. In *United States v. Phosphate Export Association*, 393 U.S. 199, 21 L. Ed. 2d 344, 89 S. Ct. 361, this court rejected such a contention, saying:

> "But here we have only appellees' own statement that it would be uneconomical for them to engage in any further joint operations. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellees' shoes. *United States v. W. T. Grant Co.*, 345 U.S., at 633, 97 L. Ed. at 1309, 73 S. Ct. 894."

So in this case we have only the statement of counsel that DeFunis will graduate at the end of the academic year. If the court should deny this petition and the University should terminate Mr. DeFunis' enrollment, Mr. DeFunis would have no recourse. A footnote in a brief is not enough to bind the University to assure DeFunis he will be permitted to continue in school. *The enrollment is now in effect only because of the outstanding injunction and stay.*

Further, DeFunis should be entitled to graduate as a legally enrolled student and not have the stigma throughout his professional career of having attained graduation only because of the delays of litigation.

This court has recognized an exception to the mootness rule in cases where controversies present what are essentially recurring issues of public interest and where there is no assurance that the occasion for a restraining order will not recur.

These rulings were summarized by the 8th Circuit Court of Appeals in *Ihrke v. Northern States Power Company* (Ca. 8th 1972), 459 F.2d 556, 15 F.R.S. 2d 1571, where the court said:

> "However, federal courts have recognized an exception to the mootness doctrine where recurring questions of public interest are involved. In *Women Strike for Peace v. Hickel*, 137 U.S. App.D.C. 29, 420 F.2d 597, 604 (1969) (2-1), the federal court
>
> > "'*When controversies present what are essentially recurring issues of public interest they are not mooted because the most recent particular occasion for consideration of the issue has come and gone.*'
>
> *See also* United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 97 L. Ed. 1303 (1953); Allen v. Hickel, 138 U.S.App.D.C. 31, 424 F.2d 944, 950 (1970); Friend v. United States, 128 U.S.App.D.C. 323 338 F.2d 579, 581 (1967) and cases cited therein at n.1.
>
> "In *Boggess v. Berry Corporation*, 233 F.2d 389, 391, 16 Alaska 256 (9th Cir. 1956) the Ninth Circuit held:
>
> > "'Where, however, interest of a public character are involved under conditions that may immediately be

repeated, thus giving the litigation a continuing character . . ., *the mere fact that the particular subject matter of the instant cause has expired does not render the case moot.*'

"In *Dyer v. Securities and Exchange Commission*, 266 F.2d 33, 47 (8th Cir.), cert. denied, 361 U.S. 835, 80 S.Ct. 86, 4 L.Ed.2d 75 (1959), this Court recognized the 'public interest' exception to the mootness doctrine. In that case, this Court said:

"'In still wider horizon, there also is a recognized right of judicial discretion, in the public interest, to deal with the validity or propriety of administrative regulations and actions, where they have justiciably been brought into court, even though they may perhaps have ceased thereafter to have a direct significance in the particular situation. This does not mean that a court is required or has the right to engage in a decision of this character in every such situation; but it is judicially entitled to do so where it appears that some general benefit may public-wise, or in relation to the possibility of further similar litigation, come from having it established whether the administrative agency has acted within or without its authority.'"
[Emphasis added.]

The foregoing case, while a decision of the Court of Appeals, resulted in this court retaining jurisdiction and making a decision. 409 U.S. 815, 93 S.Ct. 66, 34 L.Ed.2d 72.

To the same effect see *Dunn v. Blumstein* (1972), 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274; and *Moore v. Ogilvie* (1969), 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed. 2d 1; and *Southern Pacific Terminal Company v. Interstate Commerce Commission* (1911), 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310.

This case falls within the ruling of the cases just cited. In addition to being a matter of wide public interest, *this case has not become moot at this time and involves a current and viable issue, namely, the right of Mr. DeFunis to continue his enrollment in the University of Washington Law School and to graduate as a legally enrolled student.*

This right needs to be protected. He should not be subjected to chancing the results of a decision by the authorities of the

University to terminate his enrollment once the stay is lifted.

This is one of those cases where the mootness doctrine does not apply because the condition sought to be protected is still very much present, namely, his continued enrollment.

This case is like the situations discussed in Moore F.P.2d V.6a, Page 57-133, ¶57.13, where the text states:

> "The performance of the particular act sought to be enjoined may moot the injuction issue, but where there is a likelihood that the act complained of will be repeated, the issues remain justiciable, and a declaratory judgment may be rendered to define the rights and obligations of the parties. This is peculiarly true when the behavior underlying the action is such that in the nature of things the immediate controversy will be terminated before the underlying rights can be heard on appeal. In such cases a strict adherence to the requirement of a present controversy would leave the plaintiff always suspended between prematurity and mootness. *Roe v. Wade* was such a case. The issue involved was the constitutionality of a state statute prohibiting abortions except under very limited circumstances. If the plaintiff were to bring the action before she was pregnant, she would risk dismissal for want of standing. If she waited until she was pregnant, she would have a maximum of 266 days in which to litigate before the case was moot. Indeed, under the doctrine ultimately announced, 90 days. Under these circumstances the Supreme Court held that the mootness doctrine would not be applied to require dismissal."

A case involving a student's right to attend a university may be analogous to the situation presented in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 referred to in the above quotation, where the process of litigation might extend beyond the term of his course and no resolution of the issues by this court could ever take place if the mootness doctrine were applied in all of its strictness.

However, this is not a case where we must rely upon the doctrine of *Roe v. Wade* because ***nothing has occurred to make this case moot.***

There is a real issue involving rights which DeFunis is entitled to call upon the courts to protect. This case is not moot.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, ET AL., *Petitioners,*

v.

CHARLES ODEGAARD, ET AL., *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF A GROUP OF LAW SCHOOL DEANS AS AMICI CURIAE

INTEREST OF THE AMICI

The *amici* are deans of law schools located throughout the United States who are concerned with the effect a decision reversing the Supreme Court of Washington would have on the admission policies and student composition of law schools throughout the nation. The deans believe that law schools must retain the administrative flexibility and discretion to employ a wide range of criteria, both subjective and objective, in selecting those students who can best contribute to their law school and to the legal profession. The deans believe that it is equally imperative that law schools continue to be permitted to consider the minority status of an applicant as one criterion in the admissions process so that they can effectively fulfill their obligation to take affirmative steps to overcome the continuing effects of past discrimination in law schools and in the legal profession.

CONSENT OF THE PARTIES

Marco DeFunis, *et al.*, and Charles Odegaard, *et al.*, by their attorneys, have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

QUESTION PRESENTED

Does a state supported school of law violate the Equal Protection clause of the Fourteenth Amendment when, in endeavoring to overcome the effects of past discrimination, it considers an applicant's racial or ethnic background among the many factors it weighs in determining whom to admit?

SUMMARY OF ARGUMENT

The University of Washington Law School, like most law schools, employs a wide range of criteria in selecting students for admission who can best contribute to the law school and to the legal profession. These law schools have found that many of the goals they hope to accomplish through their admission policies would go unrealized were they mechanically and uncritically to accept candidates solely on the basis of college grade averages and LSAT scores. Several of the most important of these admission policies require the law schools to consider the race and ethnic background of the applicant as one of the many factors that are examined in reaching a decision. These policies include the desire to insure a representative student body, the desire to help overcome the critical shortage of minority group lawyers so that all groups are represented in the profession so influential in both public and private policy decisions in the United States, and, most important of all, the desire to remedy the continuing effects of racial and ethnic discrimination

which has for so long denied minority groups their rightful place of equality in American society. Such voluntary efforts to overcome our nation's legacy of slavery and discrimination are constitutionally permissible and should be encouraged.

ARGUMENT

The Admissions Policy of the University of Washington School of Law Represented the Exercise of Sound Administrative Judgment.

I. DETERMINING WHOM TO ADMIT TO A LAW SCHOOL CLASS INVOLVES WEIGHING A MYRIAD OF FACTORS, BOTH SUBJECTIVE AND OBJECTIVE.

Choices among different people are generally difficult. Choosing among applicants for a law school class is no exception. Indeed, in the case of the University of Washington Law School in its selection of the class entering in the fall of 1971 the difficulties were staggering. There were 1601 applications for no more than 150 positions in the class. (Finding X, A. 48) [1] Since most of the applicants were considered capable of doing the work which is required in law school, the school faced two difficult questions: What criteria were to be used to choose among capable applicants? How can those criteria be applied within the limits of the manpower available to review the applications and the time available for this process?

The school found appropriate and workable answers to both questions. In selecting applicants for admission the admissions committee followed this standard:

> "In assessing applications, we began by trying to identify applicants who had the potential for out-

[1] References to material in the Single Appendix are denoted herein as "A."

> standing performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large." (A. 34-5)

The committee's interpretation of this standard was guided in part by the University policy to eliminate "the continued effects of past segregation and discrimination" against minority group members. *DeFunis* v. *Odegaard*, 82 Wn. 2d 11, 19, 507 P. 2d 1169, 1175 (1973).

Members of the admissions committee spent about 1300 hours in the process of deciding whom to admit. Much more time would have been necessary if certain steps had not been taken to facilitate the decision-making process. For each applicant a predicted first year average (PFYA) was calculated based on college grades, the LSAT aptitude score, and the LSAT writing score, and this figure was used to separate the applications into three groups, which received different levels of attention. Secondly, applications from minority group members were considered separately. These steps were taken in order to establish general criteria applicable to all candidates and to insure that special factors relevant to minority candidates were taken into consideration. No applicant was either accepted or rejected solely on the basis of his or her PFYA. No applicant was either accepted or rejected solely on the basis of his or her race or ethnic background. *DeFunis* v. *Odegaard*, 82 Wn. 2d at 17, 19, 20, 39-40, 507 P. 2d at 1173, 1174, 1175, 1185-86.

The PFYA, based upon the LSAT score and college grades, was only one part of the decision-making process. It stands out because it is the only factor which is quantifiable, but this should not lead to an

overrated estimate of its importance. Its weight might vary from applicant to applicant. For example, experience with particular colleges might indicate that their grades predicted very well the law school grades of students coming from it. Such grades would be relied on more than grades from a school which had sent few students to the law school before or from a school whose grades did not predict law school performance. Two students were admitted, moreover, who had no grades at all from the last two years of college. (A. 40-41)

Grades and test scores are not all that schools consider in determining whom to admit. Law schools (and other institutions of higher education) use a variety of criteria in reviewing applications. For example, the University of Washington Law School gave preference to a certain class of veterans, men who had been admitted in the past but had been unable to attend the law school because of the draft. These applicants were admitted automatically. (A. 31) In some cases these veterans could not meet current standards. Though one could argue that admitting such a veteran deprives a better qualified applicant of a place in the law school, considerations of fairness and of national policy make this preference unobjectionable.[3]

Some state universities and law schools give preference to residents of the state, though no claim is made that residents of the particular state are better students. In fact, petitioner argued unsuccessfully below that the University of Washington was required

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[3] Preference for veterans is a common feature of many of our laws. *See, e.g.*, 5 U.S.C. §§ 3309, 3312; 38 U.S.C. §§ 1681, 1801-27; 42 U.S.C. § 1477; 43 U.S.C. § 186; 50 U.S.C. App. §§ 459, 1884.

to give such a preference under state law. Other schools give preference to nonresidents.

Preference is sometimes given to children of alumni, even though at most schools this would work to the disadvantage of minorities, as does a preference for those applicants who have famous or wealthy parents. *Cf. Guinn* v. *United States*, 238 U.S. 347 (1915); *Meredith* v. *Fair*, 298 F. 2d 696 (C.A. 5, 1962). *See O'Neil, Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L. J. 699, 703-05 (1971).

The LSAT score is more closely related to academic competence, but it is both an attractive and a dangerous criterion. It is attractive because it is the sole common denominator among all the applicants and its three-digit character gives it the appearance of objectivity and precision. It is dangerous because at its best the information which it gives us is limited, and its appearance may be misleading.

The LSAT is designed to predict success in first year law school courses; its usefulness in doing this is accepted by almost all law schools. But it has the limitations that any test of this type has in that it is subject to errors of measurement[8] and it predicts first year grades imperfectly. It predicts grades well enough to be very useful in considering large numbers of students, but it leaves much uncertainty when individual

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[8] A score, for example, of 550 indicates that there are two chances out of three that the score reflecting the true ability of the individual is between 520 and 580. Thus to prefer the applicant with a score of 550 to one with a score of 520 or 530 has questionable justification. If, therefore, there are one or two hundred applicants all of whom have scores within 60 points of each other, the LSAT score is a very dubious basis for comparison. *See* Conslus, *The Law School Admission Test and the Minority Student*, 1970 U. TOLEDO L. REV. 501, 512-13.

students are considered. For example, if one is comparing a student with a 600 to one with a 500 one must realize that there are many factors which might lead the 500 student to perform as well as the 600 student. Motivation, financial problems, family problems, self-confidence, ability to get along with other students and with members of the faculty, interest in the courses, the possibility of illness—these are not measured on the LSAT. *See* Consalus, *supra* at 513.

In short, the selection of students for admission to law school involves the exercise of informed judgment. A mechanistic ranking of candidates is not necessarily in the interest of the law school, the legal profession or society. Here the University of Washington weighed a multiplicity of factors, and no one factor was the *sole* basis for granting or denying admission to the law school. Accordingly, courts should be very reluctant to interfere with the difficult exercise of discretion which is required by the law school admissions process. A law school can be compared to a school board trying to devise an educationally sound remedy for racial imbalance and the problems resulting from unequal education:

> "The School Board, in the operation of the public schools, acts in much the same manner as an administrative agency exercising its accumulated technical expertise in formulating policy after balancing all legitimate conflicting interests. If that policy is one conceived without bias and administered uniformly to all who fall within its jurisdiction, the courts should be extremely wary of imposing their own judgment on those who have the technical knowledge and operating responsibility for the educational system." *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 61 (C. A. 6, 1966), *cert. denied*, 389 U.S. 847 (1967).

Accord, Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Wanner* v. *County School Board of Arlington County, Virginia,* 357 F.2d 452 (C.A. 4, 1966).

II. THE RACIAL AND ETHNIC BACKGROUND OF APPLICANTS IS AN APPROPRIATE FACTOR TO CONSIDER IN DETERMINING ADMISSIONS TO LAW SCHOOL.

We contend that race and ethnic background is an appropriate factor to consider in determining who is or is not admitted to a law school. The consideration given to race and ethnic background is included as part of the admission formula not because it *per se* is a test of the qualifications of an applicant to law school, but because race and ethnic background represents a congery of factors—discussed below—that a law school is justified in taking into account.[4] Since these interrelated factors, unlike race and ethnicity, are not immutable, we can expect them to disappear eventually. At such time, the consideration of race and ethnicity *qua* race and ethnicity no longer will be appropriate.[5] But "[t]he promise of even handed jus-

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[4] *Cf.* Springfield School Committee v. Barksdale, 348 F.2d 261, 266 (C.A. 1, 1965): "The defendants' proposed action [eliminating racial concentrations in schools] does not concern race except insofar as race correlates with proven deprivation of educational opportunity . . . . It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happened to be associated with a particular race is no reason for ignoring them."

[5] For example, although Asian-Americans, Jewish-Americans, and Italian-Americans all have been subject to discrimination, this discrimination and its effects appear not to present a barrier to their admission to the University of Washington Law School.

tice in the future does not bind our hands in undoing past injustices." *United States* v. *Louisiana*, 252 F. Supp. 353, 396 (E. D. La. 1963), *aff'd*, 380 U.S. 145 (1965).

It is unrealistic to suggest that at this time color blindness is possible in the evaluation of applications for law school admission. The history of discrimination in the United States based on color, culture, and language is too long, and the continuing effect of that discrimination is too clear in the low educational and economic status of victimized minority groups to allow color blindness. "After centuries of viewing through colored lenses, eyes do not adjust when the lenses are removed." *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 6 EPD ¶ 8993 (C.A. 1, 1973). *See also, United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 876 (C. A. 5, 1966), *cert. denied sub nom. Board of Education of Bessemer* v. *United States*, 389 U.S. 840 (1967).

An admissions committee would face an intractable task in evaluating the potential of a minority applicant if it could not consider the obstacles which the applicant has had to overcome in his or her academic and personal development. How can an admissions committee evaluate in a color blind way the handicap of a segregated elementary or secondary education, how can it evaluate the effect on an applicant of being placed in a class for the mentally retarded in elementary school merely because the student's primary language was not English, or how can it evaluate the effect of attending boarding school hundreds of miles from home where the student's language and culture were systematically denied? These judgments can not be made without considering the status of the ap-

plicant as a member of a victimized minority. As the Court of Appeals for the Fifth Circuit noted:

> "How then is this constitutional imperative to be achieved in a society that still bears the ugly scars of decades of racial segregation with all of its discriminations? For it is in this social structure that the problem arises. And it is in this social structure—not that of the hoped for idyllic state when the last vestige of this invidious distinction has gone away—that the constitutional ideal must be made to work." *Brooks* v. *Beto*, 366 F.2d 1, 22-23 (C.A. 5, 1966).[6]

A. Purely mechanical criteria are an inadequate basis for determining the composition of a law school class.

While there are problems present in the interpretation of the grades and the LSAT scores of any applicant, with minority applicants these problems are multiplied. With white applicants law schools have had years of experience in evaluating the significance of LSAT scores. With minority applicants there is little experience either at the University of Washington or at other law schools. The problems peculiarly related to race with which minorities must cope at all levels of education can affect college grade averages and results on standardized tests.

The law school had reason to believe that a low score by a minority applicant on the LSAT might not be a bar to acceptable performance in law school. Students who must cope with racially related disadvantages throughout their educational careers cannot be expected to perform as well on the LSAT as other students but still might have the underlying ability

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[6] *See* Pinderhughes, *Increasing Minority Group Students in Law Schools: The Rationale and the Critical Issues*, 20 BUF. L. REV. 447, 454 (1971).

to succeed in law school. Even with lower scores or grades, the minority students accepted at the Washington Law School were found to be qualified. Especially if the student attends a summer session prior to law school to improve his basic skills and to familiarize himself with the study of law and if the faculty is willing to give extra attention to the needs of minority students, there is a good likelihood that such students will succeed in law school despite relatively low PFYAs. Thus to require the school to consider white and minority applicants together on the basis of their PFYAs is to require it to do something which would prevent its taking account of other highly legitimate considerations discussed herein.

The LSAT is designed to predict first year averages. More important ultimately, however, is the capability of the law student at the end of his law school career. For whites, first year grades generally are a good indicator of how well the student will do in the second and third years. For minorities they may be a less accurate predictor. Adjusting socially and academically to the demands of law school can be the primary activity of the first year. Overcoming educational deficiencies and gaining needed self-confidence takes time.

B. The desirability of a heterogeneous student body is an appropriate element of a law school's admission policy.

The University of Washington had sound educational reasons for wanting a multi-racial student body.[7] Many of the most serious legal and public pol-

[7] Until the last few years the number of minority law students in the entire country as well as at the University of Washington was extremely low. In the 1964-65 school year there were approximately 700 black law students, including 267 in predom-

icy issues that the lawyer will face in his career are related to the issues of race and poverty. All students will gain from having students of different racial and ethnic backgrounds participate in in-class and out-of-class discussions of these issues and from learning to live in a multi-racial community.[8]

Success in law school cannot be viewed as an end in itself. A law school is a professional school, training men and women to go out into the world and act as lawyers. The wisdom of *Sweatt* v. *Painter,* 339 U.S. 629, 634 (1950), is as relevant today as it was a generation ago:

> "[A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective

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inantly black schools in the South. This represents only 1.3 percent of the total law school enrollment, barely enough for blacks to maintain their proportion of the legal profession. *O'Neil, Preferential Admissions: Equalizing Access to Legal Education,* 1970 TOLEDO L. REV. 281, 300. In the 1967-68 school year, after many law schools had begun to recruit minority students, there were only 180 Mexican Americans and 32 American Indians enrolled in law school. *Id.* at 301 n. 58. Enrollment figures for subsequent years are as follows: 1969-70: black, 2128; Mexican American, 412; American Indian, 72. 1971-72: black, 3732; Mexican American, 881; American Indian, 140. *1971 Survey of Minority Group Students in Legal Education, quoted in* 1 1972 PROCEEDINGS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 74.

[8] *See* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16: "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . ."

> in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

The great increase in the number of qualified applicants to law school,[9] coupled with a mechanical use of the PFYA, threatened to make the University of Washington Law School into just such an "academic vacuum."

C. The nature of legal services required by the public is an appropriate consideration for a law school in constituting its student body.

The greatest shortage of legal services is in minority communities—ghettos, barrios, reservations. Members of these communities have been denied an adequate number of qualified lawyers and judges who understand from firsthand experience the seriousness of the many problems facing these communities and the urgent need to find both short-range and long-range solutions. While some white lawyers will practice in these communities and be as effective as a minority lawyer, minority lawyers are more likely to serve minority communities and in some instances will be able to provide better service:[10] They have greater

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[9] In the past three years the number of applications had gone from 704 to 1601. DeFunis v. Odegaard, 82 Wn. 2d at 15, 507 P.2d at 1172-73.

[10] Few of the nation's lawyers are minority group members. In 1966 only about one percent was black. Gellhorn, *The Law School and the Negro*, 1968 DUKE L.J. 1068, 1073. Even if the size of the legal profession could be kept constant, an additional 30,000 black attorneys would need to be trained before blacks would achieve parity in the legal profession. Gellhorn, *id.* at

familiarity with the community and its problems, they are able to communicate more effectively with the residents and gain their trust, and—in the case of the Spanish-speaking community—their ability to speak the same language is indispensable.[11] In some instances, the interests of a minority group and those of whites will be adverse. In such a case the minority group might be better served by a lawyer who shared the same interests.

This is not meant to imply that minority law students should be only trained to and should be ex-

1073. Nationwide figures for Mexican Americans do not appear to be available. Data from specific areas are suggestive of the problem, however. In Denver, for example, about nine percent of the population is Mexican American, yet only 10 of the city's 2,000 attorneys (one half of one percent) have Spanish surnames. O'Neil, 80 YALE L.J. at 727. In 1968, less than one percent of the attorneys in California had a Spanish surname, although 12 percent of the state's population is of Spanish surname. Reynoso *et al., La Raza, the Law, and the Law Schools,* 1970 TOLEDO L. REV. 809, 816. In 1968 there were almost no Indian lawyers in the country. *See* discussion in Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian,* 1970 TOLEDO L. REV. 847, 861-66. With specific reference to the state of Washington, in 1970, of the 4,550 active lawyers, only 20 were blacks (three of whom were judges), five were part or full-blooded American Indians and none was Mexican American. Thus, there was one Anglo lawyer for approximately every 720 whites, one black lawyer for approximately every 4,195 blacks, one American Indian lawyer for approximately every 6,677 Indians and not one Mexican American lawyer for the 70,734 Mexican Americans in the state. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions,* 49 WASH. L. REV. 1, 38 (1973).

[11] *Cf.* Graglia, *Special Admission of the "Culturally Deprived" to Law School,* 119 U. PA. L. REV. 351, 354 (1970), *with* TWENTIETH CENTURY FUND, ADMINISTRATION OF JUSTICE IN THE SOUTH 3 (1967) *and* Oppenheim, *The Abdication of the Southern Bar* in L. FRIEDMAN, ED., SOUTHERN JUSTICE 127 (1965). *See* Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968).

pected to serve minority communities. On the contrary, they should receive the same training as every other law student and should be free to practice whatever kind of law in whichever community they choose.[12] In fact, there has been an increasing realization by law firms, government agencies and corporations that minority lawyers have a vital role to play in fulfilling the responsibilities of the legal profession, and career opportunities for minority lawyers outside the minority community are bright.

D. It is appropriate for a law school's admissions policy to be sensitive to the pivotal role played by the legal profession in our national life.

Law firms have a leading role in our society, and lawyers are well represented in public office at all levels in the local, state, and federal governments, and in private corporations. We are "a nation that professes deep regard for the dignity of man and that in practice relies to an extraordinary degree upon the advice of professional lawyers in the formation and execution of policy." Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 291 (1943). The insight and particular sensitivity which minority group lawyers and judges can bring to the law as an institution has been lacking. Thus, if a racial or ethnic group is to share in the power, responsibility, and benefits of society it must be well represented among the legal profession.

The legal profession, moreover, has a special responsibility to set an example for the rest of the na-

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[12] *See* Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity,* 1970 TOLEDO L. REV. 539, 551-58.

tion for providing equal opportunity and overcoming the effects of past discrimination, for lawyers have a special duty to uphold the Constitution and the legal system.

Minority lawyers also have an important role as citizens in the minority community. Lawyers often have leadership roles, and they provide an example to young people, showing them that it is possible to have a professional career despite their racial or ethnic background.

> "The most striking factors underlying motivation to seek entry into law school may be related to close personal association with a lawyer as a relative, or a friend, and to encouragement from family, friends, or counsellors. These factors are too often missing in law-deprived communities where there is a lack of exposure to opportunities in law, and inadequate information and counselling at all school levels." Pinderhughes, *supra* at 454.

E. It is appropriate for the admissions policy of a public law school to be sensitive to the need to overcome the effects of past and present illegal discrimination suffered by minority group members.

1. The paucity of minority lawyers is the result of discrimination.

The factors which have led to the small number of minority lawyers are many. They are all the result—direct or indirect—of discrimination and would continue unabated even with "color blind" treatment. Accordingly, a significant increase in the number of minority lawyers cannot be expected without color conscious efforts.

While not the universal pattern, until recently many law schools refused to admit blacks, and many blacks who were able to attend law school could only do so at

all Negro institutions. *Cf. Sweatt* v. *Painter, supra. See* Gellhorn, *supra* at 1069-70. As late as 1960 the Duke University School of Law would not admit blacks, and in 1962 the University of Richmond refused to admit two blacks because of their race. Gellhorn, *id.* at 1070 n. 12. If a black did manage to graduate from law school he faced discrimination from bar associations, law firms, and government agencies. *See* Gellhorn, *id.* at 1070, 1093. Thus blacks were discouraged from going to law school by their prospects after graduation, were denied admission to law school if they nevertheless applied, and were less likely to be able to practice law if they graduated.[13]

Secondly, discrimination in elementary and secondary education throughout the country makes it less likely that minorities will attend college and obtain degrees than whites.[14] Since to be admitted to almost all law schools one must have an undergraduate degree, the pool of potential minority applicants to law school is severely restricted compared to that of whites.[15]

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[13] For information concerning the participation of Mexican Americans and American Indians in the legal profession *see* Reynoso, *et al., supra,* and Strickland, *supra.*

[14] Nearly twenty year ago, in Brown v. Board of Education, 347 U.S. 483 (1954), this Court noted that school segregation "has long been a nationwide problem, not merely one of sectional concern." *Id.* at 491 n. 6. It continues to be a nationwide problem. *See, e.g.,* Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

[15] For persons in the 25 to 34 year old bracket in 1970, 16.6 percent of whites had graduated from college, while only 6.1 percent of blacks, 5.3 percent of persons of Spanish heritage, 1.1 percent of Indians, and 3.6 percent of Philippine Americans. BUREAU OF THE CENSUS BLS REPORT No. 394, SERIES P-23 No. 38, Table 67; U. S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PC (2)1c, Table 6, PC(2)1f, Table 5, PC(2)1g, Table 35.

Thirdly, the combined effect of discrimination in education and employment has resulted in minorities having a lower median family income than whites.[16] They are thus less able to afford the expense of law school. Lower incomes also make it more burdensome to postpone full time employment for three years.

The effects of discrimination in education and employment and other areas of life are continuing and cumulative. Color blindness will not help a law school remedy the effects of these barriers. Indeed, when a remedy for past discrimination is being fashioned the consideration of race becomes necessity:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE* v. *Norwalk Redvelopment Agency*, 395 F.2d 920, 931 (C.A. 2, 1968).

See also McDaniel v. *Barresi*, 402 U.S. 39, 41 (1971).

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[16] In 1972 the median income of Negro families was $6,864 as compared to $11,549 for whites. U. S. Bureau of Census, Current Population Reports, Series P-23, No. 46, Table 7 (1972).

2. Voluntary remedial action is not dependent upon a finding of discrimination.

Since the effects of discrimination are pervasive throughout American society, it is appropriate for all institutions to take affirmative action to overcome racial inequalities. Courts have not found the absence of preexisting discrimination a bar to school boards' taking voluntary action to increase racial balance within them. *Offerman* v. *Nitowski*, 378 F.2d 22, 24 (C.A. 2, 1967).[17] Although *Swann* v. *Charlotte-Mecklenburg, supra*, arose in the context of the dismantling of a state required dual school system, it suggested that voluntary remedial action is permissible. 402 U.S. at 16; *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971). *Accord, Wanner* v. *County School Board of Arlington County, Virginia*, 357 F.2d at 454. Where courts have declined to order a remedy for *de facto* segregation they have indicated that voluntary remedies are allowed. *Deal* v. *Cincinnati Board of Education*, 369

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[17] *Accord*, Fuller v. Volk, 230 F. Supp. 25 (D.N.J. 1964), *vacated on other grounds*, 351 F.2d 323 (C.A. 3, 1965), *adhered to on the merits*, 250 F. Supp. 81 (D.N.J. 1966); Guida v. Board of Education, 26 Conn. Supp. 121, 213 A.2d 843 (Super. Ct. 1965); Morean v. Board of Education, 42 N.J. 237, 200 A.2d 97 (1964); Addabbo v. Donovan, 16 N.Y.2d 619, 209 N.E.2d 112, 261 N.Y.S.2d 68 (1965) *cert. denied*, 382 U.S. 905 (1965); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964). Similarly, courts have held that state legislative or administrative action requiring school boards to take racially conscious actions to eliminate racial imbalance need not be based on any past or present discrimination. Tometz v. Board of Education, Waukegan City, 39 Ill.2d 593, 237 N.E.2d 498 (1968); School Committee of Boston v. Board of Education, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968); Booker v. Board of Education, 45 N.J. 161, 212 A.2d 1 (1965); Balsbaugh v. Rowland, 447 Pa. 423, 290 A.2d 85 (1972).

F.2d at 65; *Springfield School Committee* v. *Barksdale*, 348 F.2d at 265-66.

In the area of employment affirmative action to increase the number of minority employees also has been allowed without a judicial finding that a particular employer or union engaged in discriminatory behavior. In *Porcelli* v. *Titus*, 431 F.2d 1254 (C.A. 3, 1970), *cert. denied*, 402 U.S. 944 (1971), the Third Circuit allowed the Newark School Board to discontinue the use of a promotion list established in 1953 and of oral and written tests used to determine who was qualified to become a principal or assistant principal. While the small number of black principals and assistant principals (3 out of 139) might have supported a finding of discrimination, the court did not rely on such a finding nor did it consider whether the tests employed were job related or whether any other evidence of discrimination was present. The court instead relied on the relevance of color to the job. *Cf. Chance* v. *Board of Examiners*, 458 F.2d 1167 (C.A. 2, 1972); *Local 189, United Papermakers and Paperworkers, AFL-CIO* v. *United States*, 416 F.2d 980, 991 (C.A. 5, 1969), *cert. denied*, 397 U.S. 919 (1970). *See also Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (C.A. 3, 1971), *cert. denied*, 404 U.S. 854 (1971).

In *Norwalk CORE* v. *Norwalk Redevelopment Agency, supra*, the Agency was required to take race into account in providing relocation housing because discrimination in the housing market made it more difficult for blacks than for whites to find legally adequate housing. There was no suggestion that the Agency was responsible for the discrimination, and

at that time discrimination in the private housing market was not considered illegal.

The situation of the law school is similar to that of the school boards, the employers or unions, and the redevelopment agency.

The law school can be viewed as the last step in an educational process that was permeated by illegal discrimination and segregation. It is justified in taking into account the "broader patterns of exclusion and discrimination practiced by third parties and fostered by the whole environment in which most minorities must live." *Johnson* v. *Pike Corporation of America,* 332 F. Supp. 490, 496 (C.D. Cal. 1971). Accordingly, it is no less permissible for a school to take into account and seek to remedy discrimination by other parts of the nation's educational system than it is to remedy its own. *Cf. Oregon* v. *Mitchell,* 400 U.S. 112, 133, 146-47, 216-17, 282-84 (1970); *Gaston County* v. *United States,* 395 U.S. 285 (1969).

Although there has been no allegation that the University of Washington Law School or the state of Washington discriminated in any way against minorities, the small number of minority students at the law school in prior years might reasonably have led the school to be concerned that its admissions policies had in fact had a discriminatory effect.

In short, if courts have *required* governmental agencies to remedy discrimination which they did not cause, *Norwalk CORE, supra,* surely this Court should *allow* the law school to remedy such discrimination.

3. Remedial action may impinge on the expectations of others.

Both governmental and private action in our society typically disadvantages some people—either di-

rectly or incidentally—as it benefits others. This is as true for actions taken to remedy racial inequalities as it is in other areas.

In employment cases where affirmative action plans are ordered or upheld there is generally some harm to potential white employees. As Judge Marvin Frankel said in discussing the remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*:

> "[I]t should be recognized . . . that the remedies Congress ordered are not required to be utterly painless. The court knows at least some of the things the whole world knows. We are aware that there is unemployment. We are even more keenly aware that this case is launched by statutory commands, rooted in deep constitutional purposes, to attack the scourge of racial discrimination in employment." *United States* v. *Wood, Wire and Metal Lathers International Union, Local Union 46*, 341 F. Supp. 694, 699 (S.D.N.Y. 1972), *aff'd.*, 471 F.2d 408 (C.A. 2, 1973), *cert. denied*, 412 U.S. 939 (1973).

In *Porcelli* v. *Titus, supra,* individual whites did not receive the promotions which they thought they had every reason to expect. While in most instances there will be no identifiable whites who are deprived of a job or a promotion, there will be a more or less readily identifiable class of whites potentially eligible for work or promotion. *See Carter* v. *Gallagher*, 452 F. 2d 315, *modified en banc*, 452 F.2d 327 (C.A. 8, 1972), *cert. denied*, 406 U.S. 950 (1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor, supra; United States* v. *Bethlehem Steel Corporation*, 446 F. 2d 652, 663 (C.A. 2, 1971); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler, supra.*

Likewise the fact that whites (or blacks) might be inconvenienced by steps taken to dismantle a dual school system is not considered an argument with any weight.

> "The remedy for such segregation may be administratively awkward, inconvenient, and even bizaare in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 28.

In this case, as in cases remedying inequality in employment and education, the remedial action had an effect on who received the benefits of legal training by the University of Washington Law School. The remedy here was designed to eradicate the effects of past discrimination. To the extent that there were those whose expectations rested on the continuation of a system which perpetuated discrimination, they were likely to suffer some disappointment. But this disappointment was mild in comparison to what courts have allowed.[18]

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[18] Petitioner is not necessarily among those damaged by the school's action. Even if none of the 36 minority students had been admitted, his position on the waiting list would not have given him a position in the class. On the other hand, if the whole admissions process were to be done over using new criteria or procedures, there is no guarantee that he would be admitted.

CONCLUSION

For all these reasons the University of Washington Law School exercised proper discretion in admitting students to the class entering in the fall of 1971, and the judgment of the Washington Supreme Court should therefore be affirmed.

Respectfully submitted,

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FEB 1 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-235

MARCO DEFUNIS, et al.,

Petitioners

v.

CHARLES ODEGAARD,

President of the University of Washington, et al.,

Respondents

On Writ of Certiorari to the Supreme Court
of the State of Washington

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.73-235

Marco DeFunis and Betty DeFunis, his wife
Marco DeFunis, Jr. and Lucia DeFunis, his wife
Petitioners

v

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington;

Respondents

On Writ of Certiorari to the Supreme Court
of the State of Washington

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MOTION FOR LEAVE TO FILE

The Petitioners have refused to grant consent to the filing of an amicus curiae by the American Bar Association. The respondent has consented to allowing the American Bar Association to file an Amicus Curiae brief in the instant case.

It is respectfully requested that this court grant this motion to allow the American Bar Association to submit its brief amicus curiae in support of the respondent Charles Odegaard *et al.* The American Bar Association (ABA) is an unincorporated, voluntary association the members of which are members of the bar of the states, territories, and possessions of the United States. It is the largest organization of the legal profession in the United States, having over 170,000 members. Its purposes include the maintenance of representative government, the promotion of the administration of justice, the application of the knowledge and experience of the profession to the promotion of the public good, and the promotion of activities of bar organizations in the country in the interests of the profession and the public.

In 1967, the Association endorsed in principle the development of a national program to encourage and assist qualified but underprivileged persons from minority groups, such as Negro, Indian, and Spanish speaking citizens, to enter law school and the legal profession. This action was taken because, although the above minority groups comprise a significant part of our population, they comprise only about 1 per cent to 2 per cent of the legal profession. The Association recognized that lawyers have traditionally played a leading role in the political, economic, and social development of our country and that more lawyers from minority groups are needed to enlarge the availability of legal services to members of those groups and to guide and assist those groups in becoming more a part of American life and society. Without an affirmative program of concern and assistance, they are not in the forseeable future likely to achieve greater representation in the profession.

To that end, the Association became one of the sponsors and constituent members of the Council on Legal Education Opportunity. The American Bar Endowment is one of the organizations which has provided substantial funds to CLEO to make its purpose a reality. The Association itself has considerable expense in administering CLEO funds and assisting in its programs and funding.

Three of the twenty-two sections of the Association have given their attention to the trial court's decision in the DeFunis case and have asked the Association to participate in an amicus brief on appeal, in support of the position of the University of Washington. One, the Section on Legal Education and Admissions to the Bar, is the part of the Association most directly interested in the field of legal education. Another, the Section on Individual Rights and Responsibilities, has expressed the view that the position of special concern in the admission of heretofore underrepresented minorities, such as that espoused by CLEO, is fully defensible and wholly necessary in the context of American legal education.

Third, the Association's Law Student Division expressly urged participation in this litigation in support of the University of Washington's position. The Law Student Division consists of some 16,000 dues-paying law students attending law schools throughout the country, including 120 within the State of Washington.

As recently as February 7, 1972, the Association's House of Delegates reaffirmed its previous expressions by adopting the following resolution:

Resolved, that the American Bar Association encourages programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups who are capable of successful completion of law school.

Further Resolved that the Association encourages the Law Student Division of the Association, as well as law student bar associations throughout the nation, to work with and assist the administration and faculties of law schools to this end.

For the foregoing reasons, the Association believes that programs encompassed by the above resolution, of which that in issue in this appeal is but one of many, are in the best interests of the legal profession as well as our nation. It believes that the Constitution permits such programs. If, as the trial court has held, the Constitution does not, the basis for the Association's encouragement of and participation in such programs will seriously be jeopardized, if not nullified altogether.

OPINION BELOW

The opinion of the Supreme Court of Washington is reported in 82 Wash. 2d 11; 507 P.2d 1169 (1973).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). Certiorari was granted on November 19, 1973.

QUESTION PRESENTED

Whether a state can take affirmative steps to remedy past discriminatory practices against black people that have resulted in an imbalance in the legal profession, an imbalance demonstrated by the fact that black American comprise only one per cent of the practicing Bar.

STATEMENT OF THE CASE

Petitioners in the instant case are, Marco DeFunis and his wife, Betty DeFunis, and their son, Marco DeFunis, Jr. and his wife, Lucia DeFunis, residents of Seattle, Washington.

Marco DeFunis, Jr. applied for admission to the University of Washington School of Law after his graduation from the University Washington in 1970. He was not accepted, but was placed on a waiting list. On August 2, 1971 he received his second notice of denial.

Plaintiff brought suit against the University of Washington, an agency of the State of Washington, the President of the University, Charles Odegaard and members of the Board of Regents, challenging the constitutionality of the admissions procedure employed by the School of Law.

The admissions committee primarily utilized a formula to derive the Predicted First Year Average. This formula is based upon the Law School Admissions Test score and undergraduate grade point average. Certain other applicants possessing special characteristics were admitted not strictly based upon their PFYA.

Such special characteristics included military applicants (those deferred from attending law school because of induction into the armed services), students engaged in an outstanding number and quality of extra-curricular activities, students who are members of minority groups, and students who attended schools of exceptionally high academic standards.

The plaintiff, had a PFYA of 76.23 (GPA--3.6, and average LSAT score 582). Seventy-four of the 155 applicants accepted for the Fall of 1971 had PFYA's lower than plaintiffs. Thirty-six of these were representatives of minority groups.

In selecting applicants the admissions committee did study and consider all qualities of the individual applicants to determine not only the potential ability to perform in law school but also, the ability to significantly contribute to the community and legal profession as a whole.

One of the several factors given consideration in evaluating the potential of the applicant was the racial characteristic of the student. The Superior Court upheld the plaintiff's claim of racial discrimination.

While the university enrolled plaintiff in compliance with the Superior Court order, it appealed the trial court's decision to the Supreme Court of Washington.

On March 8, 1973, that court in a 6-2 decision reversed the Superior Court ruling and upheld the right of the University to consider race as a factor in selecting students for its law school.

On June 5, 1973, enforcement of the judgment of the Supreme Court of Washington was stayed by Justice Douglas pending the disposition of this petition for a writ of certiorari in this court. On November 19, 1973, this court agreed to review the case.

SUMMARY OF ARGUMENT

Affirmative action programs are valid where they are used to redress the negative results of past racial discrimination and to correct present racial imbalance. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, DeFunis v. Odegaard*, 49 Wash. L. Rev. 1 (1973).

The argument for affirmative action programs is especially compelling in the case of law schools and the legal profession. While blacks make up approximately 12.5 per cent of the population they only comprise about 1 per cent of the practicing bar.

With the advent of the age of mobility, coupled with state bar examinations taking on a national character through adoption of the multi-state examination, it becomes incumbent upon the legal profession to insure and support programs that present opportunities. Opportunities heretofore have been denied a large segment of the American population solely because of the color of their skin. Gellhorn, *The Law Schools and The Negro*, (1968) Duke L. Jo. 1069. States taking affirmative steps to remedy the long standing injustice do not violate current equal protection precedents and are constitutionally within traditional bounds of state police power. To award a racially conditioned preference in law admissions so long as the state does so within carefully constructed affirmative action programs in valid and not in violation of the Equal Protection Clause of the Fourteenth Amendment. Similar practices are in existence throughout federal and state housing and work programs.

It is submitted that the states' need for curing an imbalance in the legal profession is short-termed, and if this nation is to develop a colorblind society in the long run it must 'refuse to be color-blind in the short run' B. Bittker, The Case for Black Reparations 120 (1973).

The State of Washington has presented a valid state interest in establishing its compensatory program at the University of Washington School of Law. This Court should pay deference to the legislative intent, needs, and rational behind its compensatory programs and affirm the decision of the Supreme Court of Washington.

ARGUMENT

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT FORBID EQUALIZING THE ACCESS OF MINORITY GROUPS TO HIGHER EDUCATION AND PROFESSIONAL CAREERS WHERE A COMPELLING STATE NEED IS DEMONSTRATED.

The instant case presents this Court with issues that far exceed the boundaries of the State of Washington. The State in good faith is attempting to remedy past national discriminatory practices. It is not only the compensatory program of the University of Washington that is at issue, but also a national policy of corrective programs aimed at *de facto* and *de jure* discrimination. The American Bar Association's concern is with the national impact that would result from this Court overturning the decision of the Supreme Court of Washington. Instead of being limited to the status of one individual in the system of legal education, the case thrusts upon this Court the responsibility of determing the validity of compensatory programs in all aspects of American life.

Compensatory programs similar to the one at issue in *De Funis v. Odegaard* are being implemented not only in higher education but in business and professional communities as well. See *Associated General Contractors of Massachusetts Inc. v. Altshuler*, (1st Cir., Nov. 30, 1973). See also B. Bittker, The Case for Black Reparations 120 (1973). *De Funis*, therefore, deals not only with the validity of ameliorative or compensatory admission policies in higher education, it also pertains to the problem of determining reasonable methods to be employed by the state in achieving a necessary goal. That goal is not only an increase in minority representation in the legal field but also an integration of these presently alienated and estranged culture groups into the mainstream of American society in order to promote the general welfare of the entire population. See Bell, *School Litigation Strategies for the 1970's; New Phases in the Continuing Quest for Quality Schools*, (1970) Wise, L. Rev. 257.

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quality of the alienation and indifference towards the institutions of law and government and the white society that controls them. U.S. Riot Commission *Report of the National Advisory Commission on Civil Disorders (1968).*

Social scientists recognize that most social change takes definitive form through the rule and operation of law. Henderson, *New Roles for the Legal Profession in Race, Change and Urban Society*, 483 (Orleans and Ellis ed. 1971). Unfortunately, in regard to the minority population, the legal profession itself has in the past failed to effectuate necessary changes. Some law schools have been especially slow in opening their doors to the minority student. Legal Education Advance Planning, *An Introductory Study of Minority Law Student Development Potentials* (Dec. 1971). A history of racial discrimination has resulted in underrepresentation of a substantial minority population. See Franklin, *History of Racial Segregation in the United States*, 34 Annals Amer. Aca. of Pol. and Soc. Sci. 1-5 (Mar. 1956); L. Litwaock, North of Slavery 113-117 (1961): See, *e.g., Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1958).

There exists, then, a legacy of past governmental and societal discriminatory practices establishing a compelling need for affirmative action. These discriminatory practices revolve around three manifestations of state action:

1. Failure to adequately prepare minority students to compete for matriculation positions in law schools. *Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

2. Failure to provide minority students with a sound legal education. *Missouri ex rel Gaines v. Canada, supra; Sipuel v. Board of Regents of Oklahoma*, 332 U.S. 631 (1948(; *Sweatt v. Painter*, 339 U.S. 629 (1950; *Florida ex rel Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956).

3. Failure to provide opportunities for admission into law school results in a lack of equal access to job opportunities for minority group law graduates. Note, *The Negro Lawyer in Virginia: A Survey*, 51 Va. L. Rev. 521 (1965); C. Woodson, The Negro Professional Man and the Community (1934); Haynes, *The Negro Federal Government Worker*, 3 Howard Univ. Studies in Soc. Sci. (1941).

1 - PRE-LAW PREPARATION FOR MINORITY STUDENTS

Minority students are unable to successfully compete for admission to law schools because of the inadequacy of the elementary and secondary education which they have received. Good, A History of American Education (1956).

In the segregated Southern system and in the residentially separate Northern system blacks suffered from a public which saw little value in educating blacks in other than vocational fields. The expectation level for blacks was several notches below the white 'norm'. Research has shown the self fulfilling prophecy of expectation, particularly in the educational setting. Good, A History of American Education 267 (1956).

In 1965 it was reported that children in the Massachusetts *de facto* segregated schools were as much as three years behind children in other schools in the city. In Atlanta, Georgia children in black schools were reading three grade levels below children in white schools. J. Kozol in his book *Death at an Early Age* described the harsh realities of the dual color system in the 1960's.

> "One of the saddest things on earth is the sight of a young person already becoming adolescent, who has lost about five years in the chaos and oblivion of a school system and who still not only wants to but plans to learn."
> J. Kozol, Death at an Early Age, 45-46 (1967).

Educators and social scientists have produced large bodies of evidence documenting the conclusion that racial separation has a powerful and injurious impact on the self image, confidence, motivation, and school achievement of Negro children. In *Brown v. Board of Education, supra,* this Court pointed to the inherently adverse effects of racially imbalanced school systems upon the class being discriminated against. Until very recently, and despite the mandate of *Brown,* some states openly and directly continued to maintain separate school systems for majority and minority races. See, *e.g., Cooper v. Aaron,* 358 U.S. 1 (1958); *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218 (1964) and *Swann v. Charlotte-Mecklenburg, supra.* A glaring disparity existed between the quality of education afforded the Negro and that granted the white. See, *e.g., Serrano v. Priest,* 96 Cal. Rep. 601; 487 P.2d

1241 (1971). The curriculum varied greatly between the white high school and the black high school. Kirp, *The Poor, The Schools and Equal Protection, Educational and Legal Structure,* Harvard Educational Review (Reprint 6 1971). Where there was one high school, there was always the possibility of a tracking system where blacks could be programmed into the vocational areas. See Kozol, Death at an Early Age, *supra.*

One teacher in a black Massachusetts school asked the students to write an essay about their school. This exerpt reflects the student's attitudes toward the facilities or lack of facilities:

> "The room is dirty. The auditorium is dirty, the seats are dirty. The light in the auditorium is broke. The curtains in auditorium are ragged. They took the curtains down because they was so ragged. The bathroom is dirty. The cellar is dirty." Kozol, Death at an Early Age, *Supra,* at 133.

When students emerge from such school systems they are not able to perform on the same level as their white counterparts. If they attend integrated universities for their baccalaureate degree, their grade point average is not as high as that of the average white student. Gellhorn, *The Law Schools and The Negro, supra* at 1089-1092. Their admission test scores for prefessional schools are not as high as those of the average white student. There have been many criticisms of the nationwide tests, particularly of the entrance examinations used for college and professional school admissions. Attempts have been made to create culture fair tests. However, the tests may not be the bias, the key may lie more in the posture of test taking.

> "The average child on a low income level has been shown to approach any kind of test negatively since he believes that it will only expose his shortcomings and remind him that he is at the end of the procession. To shorten the period of discomfort he usually spends little time on difficult items and makes haphazard guesses instead of thinking things through. The middle class child, on the other hand, has been taught to do his best on all tests and is accustomed to meeting the challenge with all the mental equipment he has at his command."
>
> Goldensen, *The Encyclopedia of Human Behavior* 284 (1969).

The disparities in grade point average and test scores do not, however, prove that the black student lacks potential ability. See, L. Ehrman, G. Omen, and E. Caspari, Genetics, Environment and Behavior: Implications for Educational Policy (1972); O'Neil, *Preferential Admissions*, 80 Yale L. Jo. 699 (1971), and Legal Education Advance Planning, *An Introductory Study of Minority Law Student Development Potentials, supra.*

2 - HISTORICAL STATE COMMITMENT TO LEGAL EDUCATION FOR BLACK STUDENTS

Just as minority students have not had an equal chance to compete for admission to law schools, they have likewise been been denied an equal opportunity to participate in a legal education. This is caused, first of all, by societal pressures which disincline minority youths from aspiring to a legal career. Legal Education Advance Planning, *supra.* The most highly qualified Blacks have gone into medicine, teaching, and social work. Interest in the legal field has been limited for the following reasons, among others, contends Gellhorn:

1. Belief that there is a dual justice system with lack of justice or injustice the rule for minorities,
2. Limited financial potential for minority lawyers
3. The great gulf between the expenses for a legal education and the money in hand
4. Inadequately developed communication skills
5. Ignorance of professional opportunities in the law
6. Failure to understand the scope of the legal system

In addition, the process of vocational goal setting, of acquiring roles, is partly dependent on the individual's early opportunities to observe the activities of those in the roles and to role play. However, many minority children have had little or no opportunity to observe the activities of the lawyer or the judge or the law enforcer from a positive perspective. These have been foreign roles with little role playing appeal. The concept of the role expectation - the rights and obligations of the individual in relation to the law did not develop. The lack of models contributed to the void in knowledge about the legal profession.

Furthermore, until the very recent past, the legal system has often had no place for many minority students. Gellhorn, *The Law Schools and the Negro, supra* 1069. Although the first black graduated from an American law school (Harvard) in 1869, there were law schools in 1971 which never had black graduates. Atwood, James and Long, *Survey of Black Law School Enrollment* 16 Student Law, 18, 36-38 (1971). In most Southern states, law schools and bar associations completely denied entrance to minority students until the late 1950's, even after the decision in *Sweatt v. Painter*, 399 U.S. 629 (1950) and *Florida ex rel Hawkins v. Board of Control*, 350 U.S. 413 (1956). The situation has not greatly improved since then. The University of Alabama, for instance, as of 1968, had no blacks in the law school and had not graduated a single black lawyer. Outside of the South the situation is almost as acute. In many predominantly white universities and law schools, blacks were often rarly seen. Leflar, *Legal Education: Desegregation in Law Schools*, 43 A.B.A. Jo. 145 (1957) and M. Davie, Negroes in American Society 163 (1949). Indiana University, for instance, had 27,000 undergraduates in 1968. Included in that number were some 1,700 blacks, the largest number of black students on any Big Ten campus. Yet Indiana had only three black law students enrolled during the 1967-1968 academic year. Gellhorn, *The Law School and the Negro, supra*, 1069, 1081. Not until 1965 were all member institutions of the Association of American Law Schools able to assert that admission was denied to no applicant on the ground of race or color. Until 1968, there were 200 blacks among the 10,000 graduating annually from the nation's law schools. Gellhorn, *The Law School and the Negro, supra* at 1077-1080.

The result of these discriminatory practices has been a dearth of black attorneys. Nationally, as of 1968, the legal profession numbered some 3,000 black attorneys among the more than 300,000 lawyers in the United States. Although blacks constitute in excess of 12.5 per cent of the nation's population, they were constituting less than 1 per cent of the attorneys. Whereas in 1970 there was one lawyer for every 637 persons in the United States, there was only one black lawyer for every 7,000 blacks and 14 American Indian lawyers to service 800,000 Indians. Legal Education Advance Planning, *supra* at 65.

The State of Washington mirrors the national figures. In 1970 the population of the state of Washington was 3,409,169. Black Americans counted for 71,308 or 2.1 per cent; American Indians made up 1 per cent of the population. U.S. Dept. of Commerce Bureau of Census, *General Population Characteristics of the State of Washington Tables* 17-18 (1973). In 1970 there were approximately 4,550 active members of the Washington State Bar Association. Only twenty of these members were black. In 1970 there was one white lawyer for every 720 whites; there was only one black lawyer for every 4,195 blacks and only one American Indian lawyer for every 6,677 American Indians in the state. See generall, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, DeFunis v. Odegaard* 49 Wash. L. Rev. 1, 35-41 (1973).

As the court below observed, "minorities have been, and are, grossly underrepresented in the law schools—and consequently in the legal profession—*of this state* and this nation." *DeFunis v. Odegaard, supra* at 82 Wash. 2d 32-33; 507 P. 2d 1182 (emphasis added).

As Professor Arval A. Morris of the University of Washington School of Law noted:

> "The State of Washington has a deep and abiding interest in correcting these disparities and in making sure that legal education is in fact made equally available. While the state voluntarily undertook to provide a corrective program of law school admission it may actually have been under a constitutional duty to have done so.
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> That access to legal education has effectively been denied to minority group members in the State of Washington is only too painfully evident from these statistics. Yet, minority group members pay state taxes, a part of which go to support the University of Washington and its law school. In fact, since minority groups in the state are found disproportionately in the lowest income classes, and since Washington's tax structure is highly regressive, minority groups tend to incur a disproportionately heavy state tax burden.

Furthermore, until the very recent past, the legal system has often had no place for many minority students. Gellhorn, *The Law Schools and the Negro, supra* 1069. Although the first black graduated from an American law school (Harvard) in 1869, there were law schools in 1971 which never had black graduates. Atwood, James and Long, *Survey of Black Law School Enrollment* 16 Student Law, 18, 36-38 (1971). In most Southern states, law schools and bar associations completely denied entrance to minority students until the late 1950's, even after the decision in *Sweatt v. Painter*, 399 U.S. 629 (1950) and *Florida ex rel Hawkins v. Board of Control*, 350 U.S. 413 (1956). The situation has not greatly improved since then. The University of Alabama, for instance, as of 1968, had no blacks in the law school and had not graduated a single black lawyer. Outside of the South the situation is almost as acute. In many predominantly white universities and law schools, blacks were often rarly seen. Leflar, *Legal Education: Desegregation in Law Schools*, 43 A.B.A. Jo. 145 (1957) and M. Davie, Negroes in American Society 163 (1949). Indiana University, for instance, had 27,000 undergraduates in 1968. Included in that number were some 1,700 blacks, the largest number of black students on any Big Ten campus. Yet Indiana had only three black law students enrolled during the 1967-1968 academic year. Gellhorn, *The Law School and the Negro, supra*, 1069, 1081. Not until 1965 were all member institutions of the Association of American Law Schools able to assert that admission was denied to no applicant on the ground of race or color. Until 1968, there were 200 blacks among the 10,000 graduating annually from the nation's law schools. Gellhorn, *The Law School and the Negro, supra* at 1077-1080.

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Given that Washington's minority groups have not enjoyed an equal share of public legal education and that they pay state taxes, part of which support the law school, it is obvious that the state has a compelling and overriding interest in effectively making public legal education equally available to minority group for the simple reason that under the equal protection clause a state is obligated to provide equal opportunity to all its citizens. The state's law school may fulfill that obligation voluntarily by using a racially conditioned preferential admissions policy."

Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, Defunis v. Odegaard, supra* at 37-40.

3 - UNEQUAL ACCESS TO JOB OPPORTUNITIES FOR BLACK LAWYERS

The third manifestation of state action has been the absence of equal job opportunities for minority lawyers. This has resulted from the failure to provide opportunities for admission into law schools. Compare *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See also, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions De Funis v. Odegaard, supra* at 5 (1973).

Since it is clear that minorities have not had equal access to a legal education, and consequently, the opportunity to become lawyers, the question arises as to why it is important that minority groups enter the legal profession. The question is dealt with quite adequately in Atwood, James, and Long, *Survey of Black Law Student Enrollment, supra.*

"First, the leadership of our country at every level of government is largely dominated by lawyers. Yet within the black community two traditional avenues to relative success have been through social work and the ministry.

> Black leadership, as a result, has often arisen from these professions. However, as the struggle for equal opportunities has moved from the streets to the courts and ballot box, it has been the black lawyer whose leadership qualities have increasingly been sought, especially for elective office. And who in the black community, other than the lawyer, is best able to effectively deal with institutions of power in our society -- legislative bodies, courts, administrative agencies, business and labor?" *Id* at 20.

The objectives of the University of Washington School of Law are similar to most other law schools: 1. prepare the student for public service, 2. prepare the student for the practice of law, 3. prepare the student for law teaching, and 4. to prepare the student for legal research. It is the special role of the state supported law school to supply the state as well as the nation with social inventors and social mechanics. From the University of Washington School of Law emerge the main body of political leadership in the state. See Morris, *Equal Protection Affirmative Action and Racial Preferences in Law Admissions, Defunis v. Odegaard, supra* at 41-42. The situation existing in Washington is reflected and magnified at the national level.

As long as minority groups remain underrepresented in the legal field, in excess if 12.5 per cent of the nation's population will likewise be underrepresented in positions of power. They will continue to suffer disillusionment with and alienation from the legal system through which the organization and maintenance of law and order is procured. They will seek other means, possibly violent ones, to meet their needs. See generally, U.S. Riot Commission Report, *supra.* See also Joint Economic Commission, *1964 Joint Economic Report No. 931,* 88th Cong., 2d Sess. 61 (1965).

There is, then, an evil to be cured. Minority groups are denied both access to a legal education and equal representation in the legal profession. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, supra* at 5. There is, furthermore, a compelling state interest in curing this evil. As long as it exists, a significant portion of our population is denied the opporunity to participate in the affairs of government, and the serious possibility of social unrest, if not upheaval, exists. We must ask, then, what steps can be taken to compensate for the discriminatory practices which have led to the evil which exists?

The policy followed in good faith by the University of Washington School of Law, at issue in the instant case, is one such step, and it is the only kind of policy that can be used at the present time. The simple fact is that nationally, it works. Gellhorn, *The Law School and the Negro, supre* at 1081-1085. Before compensatory programs began, minority groups were denied admission to law schools. *Id.* at 1075. Until 1968 there were about 200 Blacks out of a total of 10,000 graduating from American law schools annually. *Id.* at 1077. In the past three years, since the advent of compensatory programs, black student enrollment has increased more than 200 per cent.

UTILIZATION OF COMPENSATORY PROGRAMS ARE PERMISSIBLE WHEN RELATED TO A VALID STATE INTEREST

The University of Washington utilized race as one factor in selecting students for law school admission. Until the decision of the court below, *De Funis v. Odegaard*, 82 Wash. 2d 11, 507 P.2d 1169 (1973), lower courts had not yet squarely faced the issue of whether the ameliorative racial classification for academic admission was highly suspect, thus being subject to rigid scrutiny, or whether the university speaking for the state could demonstrate that the use of its policy was essential to the achievement of a compelling governmental objective. Ordinarily racial classifications were inherently devisive; they tended to involve a certain degree of prejudice toward persons on both sides. Thus, as the petitioner points out, the power to classify on the basis of race could be dangerous. See also *Associated Gen. Contractors of Massachusetts v. Altshuler, supra* at 13-14. However, when legislatures enacted laws based in part upon racial distinction, but designed to eliminate racial inequality, courts generally took the position that the classification could be sustained if it was rationally related to an overriding governmental purpose. The classification must be established as not invidious. It must also relate to a compelling state interest and provide a rational means of implementing that interest. See, e.g., *Brooks v. Beto*, 336 F.2d 1 (5th Cir. 1966); *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970) and *Swann v. Charlotte-Mecklenburg Board of Education, supra.*

1. *The classification in De Funis is not invidious:*

Case law has clearly established that preferential programs enhancing minority access to the mainstream of American society are not 'invidious' discrimination since the goal of compensatory programs is not the separation of the races but the equalization of two cultures within one society.

> "(T)he function of equal protection...is to shield groups of individuals from stigmatization by government. Whetheror not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational *and* because in *our* society it would not stigmatize whites." Wright, *The Role of the Supreme Court in a Democratic Society - Judicial Activism or Restraint?* 54 Cornell L. Q. 1, 18 (1968) see also; *Hobson v. Hansen*, 269 F. Supp. 401, 492-508 (D.D.C. 1967).

In accordance with these views, housing and employment racial classification have been permissible. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d, 920 (2d Cir. 1968); *Otero v. New York City Housing Authority*, *484* F.2d *1122* (2d Cir. 1973); *Associated General Contractors of Massachusetts v. Altshuller, supra.* Likewise, in elementary and secondary education, the goal of equal opportunity for all stands so important that racial classifications are considered permissible. *Offermann v. Nitkowski*, 248 F. Supp 129 (W.D.N.Y. 1965), *Wanner v. School Board of Arlington County*, 357 F.2d 452 (4th Cir. 1966); *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966); *United States v. Plaquemines Parish School Board*, 291 F. Supp. 841 (E.D. La. 1967); *Hobson v. Hansen, supra*, and *United States v. Board of Public Instruction of Polk County*, 395 F.2d 66 (5th Cir. 1968). School boards which have consciously utilized race in the past in an effort to separate students must now use racially conscious policies to bring students together. *Swann v. Charlotte-Mecklenburg Board of Education supra.* Thus, racial classifications are permissible when utilized to eradicate the vestiges of dual society. Although most courts have held that a

state need not affirmatively act to fd *de facto* segregation for which it is not directly responsible, courts generally have permitted governmental discretion in selecting and implementing policies to overcome all forms of segregation. See, *e.g., Associated General Contractors of Massachusetts v. Altshuler, supra.*, and *Otero v. New York City Housing Authority, supra.* One vestige of racial discrimination is the lack of minority access to the political and legal machinery in this country. The meagerness of such access affects the entire legal profession.

2. There is a compelling state interest.

This Court has held that racial classifications can be part of programs that further overriding or compelling state interests. See *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). See also *Brooks v. Beto,* 336 F.2d 1 (5th Cir. 1966). In *McLaughlin,* this Court required proof that racial classification did indeed seek to remedy effects of past racial discrimination. See also *Norwalk CORE v. Norwalk Redevelopment Agency, supra,* and *Asso. General Contractors of Massachusetts v. Altshuler, supra. Brooks* illustrated that the intentional inclusion of blacks on a grand jury was a permissible means of remedying the effects of past racial discrimination. In *Brooks,* the community in question supported a population of 10 per cent blacks, yet it had not employed a black member on a grand jury. Likewise affirmative action requirements promulgated by federal agencies have generally been upheld. For example, the Department of Labor's affirmative action program insuring minority hiring on federal construction projects was upheld in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor,* 311 F. Supp. 1002, 1009 (E.D. Pa. 1970). See also, Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions, De Funis v. Odegaard, supra* at 35-46.

3. The State has adopted a rational means of implementation.

The intentional use of racial classification by the state is a reasonable means of implementing the compelling state interest in having more minority representation in the legal profession. Increasing the number of minority lawyers requires greater input into the educational system of minorities who are currently

disproportionately underrepresented in the major academic institutions in the United States.

NECESSITY FOR AND RATIONALE BEHIND RACIAL CLASSIFICATION

It is respectfully submitted that these circumstances cannot be artificially separated and dealt with in isolation as suggested by petitioners. It is further submitted that these circumstances present this Court with a compelling issue of national concern. Early childhood deprivation and the lack of adequate preparational expectation in the primary and secondary school systems have made it impossible for a large number of otherwise qualified minority students to have the opportunity to qualify for law school admission on a competitive bases. See generally Schrader & Pitcher, *Predicting Law School Grades for Black American Students*, LSAC Annual Report (1973), and Bell, *In Defense of Minority Admissions Programs: A Response to Professor Gaglia*, 119 U. Pa. L. Rev. 364 (1970). Consequently, more than 12.5 per cent of the nation's population experiences disillusionment with the educational system as well as the legal system through which the organization and maintenance of law and order is procured. See, generally, U.S. Riot Commission Report, *supra*. This cannot be viewed solely as an individual state's problem, because of the mobility which typifies the American character and which is on the increase within the academic and professional communities. Legal Education Advance Planning, *supra* at 125-128. Those receiving undergraduate education in one state will often attend a professional school in another state. *Ibid.* Many southern blacks have been forced to go east or west or north in order to obtain a legal education. Couple this fact with the increased emphasis upon the multi-state bar examination, *ibid.*, and the increased freedom of movement, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *United States v. Guest*, 383 U.S. 745 (1966), for the purpose of securing more meaningful benefits, *Shapiro v. Thompson*, 349 U.S. 618 (1969), and it becomes clear that the issues involved in the instant case take on national proportions.

SINCE THIS NATIONAL ISSUE EVOLVED FROM A HISTORY OF STATE ACTION, GOVERNMENTS HAVE ACCEPTED THEIR RESPONSIBILITY TO ACT AFFIRMATIVELY

The First Circuit Court of Appeals in *Altshuler* stated that:

> "...discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's more intransigent and deeply rooted inequalities. Intentional, official recognition of race has been found necessary to achieve fair and equal opportunity. . ." *supra* at 11-12.

Consequently, this Court and many of the lower federal and state courts that have considered the issue make it clear that the Constitution is color conscious where color is to be taken into account to prevent perpetuation of a discrimination and to undo the impact and effects of past segregated practices. See collection of cases cited in O'Neil, *Preferential Admissions Equalizing the Access of Minority Groups to Higher Education*, *supra* at 707-709. See, also, *Associated General Contractors of Massachusetts v. Altshuler* and cases cited therein, *supra* at 11-14.

As this Court noted in *Green v. County School Board*, 391 U.S. 430 (1968), past state discriminatory practices have so diluted educational programs for blacks that now the burden rests upon school boards to come forward with plans that promise realistically to work, and to work *now*. Judge Sobeloff added, in *Bowman v. County School Board*, 382 F.2d 326, 333 (4th Cir. 1967) (concurring opinion), that 'the school officials have the continuing duty to take whatever action may be necessary to create a unitary non-racial system.' In *Springfield Community v. Barksdale*, 348 F. 2d 261 (1st Cir. 1965), the court noted:

> "Racial imbalances disadvantage Negro students and impair their educational opportunities as compared to the other races to such a degree that they have a right to insist that school authorities consider special problems along with all other relevant factors.

> (Given a) racial group which has historically been the object or victim of the state generated discrimination, the selectors can perform their constitutionally prescribed duty only by being conscious of that class. This means they must be conscious of that race and be conscious that the system constructed or followed by them has as its conscious the supplying of that race for inclusion in the universe."

Norwalk CORE v. Norwalk Board of Education added:

> For this court to intervene in a case such as this (attempt to overcome *de facto* segregation by busing) would be to discourage voluntary action by enlightened public officials attempting to correct one of the underlying causes of racial tension in this nation." 298 F. Supp. 213, 226 (D. Conn. 1969).

But the problem at issue is not confined to the realm of school admissions. Courts have supported similar programs in business and professional arenas. In *Porcelli v. Titus*, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), white teachers alleged that the local school board had bypassed them when it abolished the regular promotion schedule for selecting principals and vice principals and had instead given priority to black candidates in order to increase the integration of the system's facilities. In upholding the board's judgment to eliminate the ordinary promotion system, the court stated that state action based partially on considerations of color is not necessarily a violation of the Fourteenth Amendment when color is used in furtherance of a proper governmental objective. The emphasis rested upon the legitimate purpose, the valid state interest to be achieved. The court further held that in some situations the means of achieving the valid state interest may appear to be administratively awkward, or inconvenient, or may even impose burdens on some. However, awkwardness or inconvenience cannot be avoided in an interim period when adjustments are being made to eliminate dual school systems. *Swann v. Charlotte-Mecklenburg, supra; Associated Contractors of Massachusetts v. Altshuler, supra* at 11.

As noted in *Evers v. Jackson Municipal Separate School District*, 328 F.2d 408 (5th Cir. 1964), the time for footdragging is over. Since the early 1950's, law schools have known that they must open their doors to the minority student. In 1974, there are still law schools that have failed to produce a black graduate. Consequently, 'the rule has become the later the start, the

shorter the time allowed for transition.' *Lockett v. Board of Education of Muskogee County School District*, 342 F.2d 225 (5th Cir. 1965). See, also, *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729, 730 (5th Cir. 1965).

As the Court below noted in *De Funis*, the shortage of minority attorneys, resulting in the shortage of minority prosecutors, judges, public officials, governors, legislators, and the like, constitutes an undeniable, compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within the legal system. *De Funis v. Odegaard*, *supra* at 35.

There is a compelling need to insure proper representation of attorneys within the minority community. This need must focus upon and favor those racial minority groups not only underrepresented but also disproportionately the:

> "(a) victims of overt racial discrimination; (b) socioeconomically disadvanted; (c) unfairly appraised by standardized tests; and those who are (d) graduates of overcrowded, rundown and badly staffed high schools. Most black, Spanish-American and American Indian applicants clearly meet these criteria and therefore present the strongest claims for special consideration.' O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, *supra* at 750.

Thus, the consideration of race in the law school admissions policies meets the test of valid state interest and necessity because its goal is to alleviate the racial imbalance existing in the legal profession. This goal can be achieved only by providing a legal education to those minority groups which have been historically deprived of equal educational opportunities.

The most compelling argument in favor of the test was stated by the majority opinion in the Court below when the court noted:

> 'It has been suggested that the minority admission's policy is not necessary, since the same objective could be accomplished by improving the elementary and secondary education of minority students to a point where they could secure equal representation in law school through direct competition with non-minority applicants on the basis of the same academic criteria. This could be highly desirable, but 18 years have passed

since the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and minority groups are still grossly underrepresented in law schools. If the law school is forbidden from taking affirmative action, this underrepresentation may be perpetuated indefinitely." *De Funis v. Odegaard, supra* at 36

Twenty years have now passed since *Brown*, and minority groups are still denied proportionate representation. The unfortunate legacy of the past action continues.

Thus the case law is clear. The states may identify and correct serious racial imbalance where the goal is to insur legal training and to represent those who have in the past been systematically shut out of the legal profession. Such action is permissible even though it does not provide an immediate solution to the entire problem of equal representation within the legal system.

It is a bold beginning that has, in the past three years, borne the fruits of its efforts. For this Court to sustain the petitioner's argument would be the equivalent of sustaining the segregation of the past. The case law is clear that segregation cannot be tolerated; remedial programs voluntarily entered into by state and national governments aimed at ending segregation within professions and within professional schools should be approved as meeting a compelling state need.

> "It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when one's lenses are removed." *Associated General Contractors of Massachusetts v. Altshuler, supra* at 11.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Supreme Court of Washington be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Fletcher N. Baldwin, Jr., Attorney for the American Bar Association as Amicus Curiae and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day on January, 1974, I served copies of the foregoing Brief and motion for leave to file on petitioners and respondents there in named, by mailing copies in a duly addressed envelope, with postage prepaid, to Josef Diamond, Esquire, 400 Hoge Building, Seattle, Washington 98104 *and* James B. Wilson, Esquire, Senior Assistant Attorney General, 112 Administration Building, University of Washington 98195.

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Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,
Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE STATE OF OHIO

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Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,
Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE STATE OF OHIO

INTEREST OF STATE OF OHIO

The State of Ohio, pursuant to national policy, has initiated its own affirmative action programs. Since any decision in this case could affect these programs, the State, by its Attorney General, respectfully submits this brief as *amicus curiae* pursuant to Rule 42, Part IV of the Revised Rules of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 507 P.2d 1169, *DeFunis, et al. v. Odegaard, et al.*

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Washington, *en banc*, was rendered on March 8, 1973. The petitioner's Motion for Rehearing was denied on May 16, 1973. The Petition for a Writ of Certiorari was filed on May 24, 1973, and granted on November 19, 1973. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, §1 ". . ., nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION FOR REVIEW

Whether the admissions policy of the University of Washington's school of law, which considers the race of qualified applicants as an admissions factor, among other factors, violates the equal protection clause of the fourteenth amendment.

STATEMENT OF FACTS

The University of Washington College of Law received 1601 applications for admission to the first-year class of 1971. As a result of enrollment limitations only 150 of these applicants would secure a position at the law school. The determination as to whom would be admitted was left to the Admissions and Re-Admissions Committee, a committee established by the dean and faculty of the law school.

A person seeking admission must have received an undergraduate degree and taken the Law School Admissions Test (LSAT). Additionally, applicants were required to submit copies of transcripts from the universities and colleges which they attended, statements from the Dean of Students of those schools, and recommendations from faculty members in their major fields.

The Committee's goal was to isolate those individuals who in their judgment had the potential for outstanding academic achievement. From this group the committee selected applicants on the basis of their ability to make significant contributions to the law school and to the community at large. To make this determination the committee followed the criteria outlined in its Guideline for Applicants:

> "We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation." 507 P. 2d at p. 1174.

The procedure utilized by the committee to choose those 150 persons who would comprise the first-year class

was the following. Initially, a preliminary ranking system was used in which Junior-Senior grade point averages and LSAT scores were converted into a single figure or index. This was called the Predicted First-Year Average (PFYA). After ranking all applicants in this manner, the Committee decided from past experience that those applicants with PFYAs above 77 were to receive the immediate attention of the entire committee so that an early decision could be made as to their suitability. Persons with PFYAs below 74.5 were reviewed by the Chairman of the Committee alone, and admission was ordinarily declined unless some redeeming matter was seen in his file that warranted the consideration of the entire committee. Applications of minority individuals (Black, Chicano, American Indian, Filipino) were to be considered by the Committee regardless of PFYA score.

Final consideration of those individuals with PFYA scores between 74.5 and 76.99 and certain persons with PFYAs above 77 and minority group members was deferred until after the final deadline for receipt of applications. Petitioner was within this category due to a PFYA of 76.23. At this point, files were randomly distributed to committee members for individual consideration. The files of black applicants, however, were referred to the same two committee members. Similarly, applications of Chicanos, American Indians and Filipinos were always reviewed by another committee member.

The purpose of this procedure was to assure a reasonable representation within the law school of those minority groups which have traditionally been underrepresented.[1] This university-wide policy recognized that a purely mathematical approach to admissions often excluded quali-

[1] Of the 356 law students enrolled in 1969, 8 were black. Defendant's Ex. #7.

fied members of certain minority groups with a consequential underrepresentation in the legal system. The end result was that the law school admitted some members of the minority group with lower "mechanical credentials" than majority group applicants. The Committee did not admit unqualified persons and it did not establish a quota system for minority admissions.

Because of the difficult judgment factors to be weighted in the admission process, those ultimately admitted did not exactly follow PFYA rankings. Of those who were extended invitations, 74 had lower PFYAs than petitioner; 36 of these were minority persons; 22 were veterans who had previously been admitted, and 16 were applicants judged by the Committee as deserving invitations on the basis of other information contained in their files. Of those denied admission along with petitioner, 29 had higher PFYAs than the petitioner.

The record also reflects that the University of Washington's school of law had as its goal to become a "national" law school, and therefore attempted to draw applicants from throughout the country, not only from the State of Washington. 507 P. 2d at p. 1190.

SUMMARY OF ARGUMENT

The University of Washington law school's minority admissions policy, in which an applicant's race is a factor considered in deciding what is the probability of the individual succeeding in law school and making a significant contribution to law school classes and the community at large is a constitutional exercise of the school's discretionary powers.

There is no evidence in the record under this standard which demonstrates that petitioner was more qualified than minority students admitted to the law school. Under this standard the law school invited for admission 74 applicants with lower PFYAs than petitioner, of whom 36 were minority, 22 were returning from military service, and 16 were applicants judged by the admissions committee as deserving invitations based on information contained in their files.

Because the minority admissions policy promotes a compelling state interest in remedying past discrimination, which restricted minority persons' access to the school and the legal profession, it satisfies the equal protection clause of the fourteenth amendment to the United States Constitution. Even if the law school has not engaged in past discrimination and the underrepresentation of minorities in the law school is due to *de facto* segregation, the equal protection clause permits consideration of race to remedy any racial discrimination. This is true even though the law school's policy may not be required by the equal protection clause, because the discretionary power of public authorities to remedy any racial discrimination is broader than that of the judicial branch.

Moreover, the minority admissions policy is consistent with national public policy to encourage or require affirmative action to eliminate racial discrimination.

ARGUMENT

I. THE LAW SCHOOL'S ADMISSION POLICY WAS BASED UPON A STANDARD OF DETERMINING THE PROBABILITY OF AN INDIVIDUAL SUCCEEDING IN LAW SCHOOL AND MAKING A SIGNIFICANT CONTRIBUTION TO LAW SCHOOL CLASSES AND THE COMMUNITY AT LARGE.

Petitioner's argument that the law school violated his right to equal protection of the laws under the fourteenth amendment to the United States Constitution is premised on his being more qualified than minority students admitted to the law school; this belief is based on the fact that his Predicted First Year Average (PFYA) of 76.23 was higher than the PFYA of many minority students who were accepted. As a result, petitioner asserts in his brief that his denial was on the basis of "race alone" or "solely on the basis of race." Brief, pp. 2, 3. This is overstating the issue before this Court since race was only a consideration in the admissions procedure.[2]

The PFYA was arrived at by combining the junior-senior grade point average and the scores received on the LSAT. Then a formula was utilized to compute the PFYA.[3] There is no magic in the PFYA. Whether one applicant is more qualified than another cannot be determined by PFYAs alone. Yet, petitioner would not allow any deviation from the relative numerical ranking provided by the PFYAs. Despite petitioner's attempts to portray the PFYA as an objective standard determinative of ability to complete the law school program, the fact is that the law school

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[2] The Supreme Court of Washington found:

An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions. 507 P.2d at p. 1174.

[3] The record does not reflect the precise formula used nor does it reflect that the formula itself was objective. 507 P.2d at p. 1173.

did not limit its inquiry to a purely mathematical formula, nor should it have done so. In reviewing each applicant's file, the same basic question was considered: what is the probability of the individual succeeding in law school and making a significant contribution to law school classes and the community at large? This question cannot be answered by a mathematical formula. Although such a standard lends itself to subjectivity, it is submitted that the method of calculation of the PFYA itself is subjective in at least two ways. To the extent that it reflects the applicant's junior-senior grade point average, it is not objective because comparing grades achieved at one undergraduate college with grades achieved at another college assumes that both colleges grade on the same standard, when in reality different colleges may grade either more strictly or more liberally and some colleges are more demanding and competitive than others. Further, within any given college, certain courses of study may be more difficult to achieve higher grades than other fields. The second subjective element in the PFYAs was weighing an applicant's LSAT scores. Whether the law school aptitute test (LSAT) in fact bears a cultural bias rendering the test less reliable as a predictor of law school performance for minority students is not in issue in this case. (As the Court found, the LSAT's validity under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is not in issue, 507 p. 2d at p. 1186.) A number of courts including this Court have recognized that minority group persons perform substantially less well than white persons on generalized "intelligence" or "aptitude" tests. *Griggs v. Duke Power Co., supra; Hobson v. Hansen*, 269 F. Supp. 401 (D. D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972);

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); *Arrington v. Mass. Bay Transit Authority*, 306 F. Supp. 1355 (D. Mass. 1969); *See also* Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARVARD LAW REVIEW 1598 (1969).

In addition to the above cases, there is a body of literature suggesting that numerical indicators of academic ability are unreliable in evaluating minority persons.[4] Similar conclusions in the validity of numerical scores in evaluating ability are reached in the literature on testing for employment purposes.[5] Because numerical indicators may have a discriminatory effect upon minorities, the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance both require that tests be validated for various racial and ethnic groups through empirical study. 29 C.F.R. 1607; 41 C.F.R. 60-3.

The President of the University of Washington was aware of this possible testing bias. He testified to his belief that the conventional standards were unreliable, and that other indicators of qualification, evidenced by an individual's background, should be used to judge potential to succeed in the school's program.

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[4] Gozanski and DeVito, *An Enlightened Comparison: The Relevant Strengths and Weaknesses of the CLEO Program and the Pre-Start Program of Emory University*, 1970 U. OF TOLEDO L. REV. 719; Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069; Fleming and Pollack, *The Black Quota at Yale Law School*, 19 PUBLIC INTEREST 44 (1970); Comment, *Current Legal Education of Minorities: A Survey*, 19 BUFFALO L. R. 639 (1970); Scoles, *Challenge and Response in Legal Education*, 48 ORE. L. REV. 129 (1969).

[5] Cooper and Sobol, *Seniority and Testing Under the Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, supra*; *Race, Employment Tests and Equal Opportunity*, INDUSTRIAL MANAGEMENT, March, 1966; Barrett, *Gray Areas in Black and White Testing*, HARVARD BUSINESS REVIEW, Jan.-Feb. 1968; Note, *Legal Implications of Standardized Ability Tests in Employment and Education*, 68 COLUMBIA LAW REVIEW 692 (1968).

It is the law school's task to develop sensitive performance-related admission criteria which will reflect those qualities necessary to achieve the school's educational mission. There were 1601 applicants for the class beginning in the fall of 1971, but only places for 150 students. Most of the 1601 were qualified. As the lower court found:

> "Of the applicants invited for admission, 74 had lower PFYAs than plaintiff; of these 36 were minority, 22 were returning from military service, and 16 were applicants judged by the committee as deserving invitations on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's 'were denied admission' ". 507 P.2d at p. 1176.

It is essential that the admissions committee be granted discretion in determining what qualifications are desirable in its student body to enhance the quality of the education it provided. Nothing in the record demonstrates that petitioner was more qualified than minority students admitted to the law school other than some numerical indicators which do not reliably measure the qualities which the law school felt best qualified an applicant to enhance the educational goals of the school. The law school should be permitted to put the numerical indicators in their proper perspective, rather than be forced to rely on such indicators where the effect of such reliance is to exclude minority persons. The law school's action is analogous to what this Court required in *Griggs v. Duke Power Co., supra.* As Justice Wright stated in his concurring opinion below:

> "Of course, the easy way would be to devise a purely mathematical formula for admissions and then apply it inflexibly. That, however, might not produce the best results. It is a matter in which the administra-

tion of the university and of the law school should exercise some discretion. Certainly there is enough intelligence, experience and common sense within the admissions committee to properly exercise its discretion." 507 P.2d at pp. 1188, 1189.

The law school's standard for admissions was not solely the PFYAs nor was it solely the basis of race as petitioner alleges. The standard was the probability of an applicant succeeding in law school and making a significant contribution to the school and the *community*. Under such a standard, the law school was justified in considering race as one of the factors in reaching its admissions decision.

II. THE UNIVERSITY OF WASHINGTON'S MINORITY ADMISSION PROGRAM PROMOTES A COMPELLING STATE INTEREST THEREBY SATISFYING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A statute or regulation classifying on the basis of race has been considered by this Court so "inherently suspect" that it is subjected to "the most rigid scrutiny." To be upheld as constitutionally permissible, it must promote a "compelling governmental interest," *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), or serve some "overriding" purpose, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). Although such classifications require a heavier burden of justification, they are not in and of themselves violative of the equal protection clause.

A. The Law School's Minority Admissions Policy Is Appropriate Affirmative Action to Remedy Any Past Discrimination Which Restricted Minority Persons' Access to the School.

There are striking similarities between the action which the law school voluntarily took and actions which

construction contractors have been required to take in response to statistical evidence of past discrimination. For example, based on statistical evidence that minorities were underutilized, the Commonwealth of Massachusetts required each contractor on a certain project to take every possible measure to employ not less than twenty percent minority workers in each job category. Herein, the law school, based on statistical evidence that minorities were underrepresented, voluntarily made efforts to increase minority admissions.

In upholding the contract provisions imposed by the Commonwealth of Massachusetts as not in violation of the equal protection clause, the Court in *Associated General Contractors v. Altshuler*, ___ F. 2d ___, 6 FEP Cases 1031 (1st Cir., Nov. 30, 1973) stated:

> "[I]n the present instance, there is no question that a compelling need exists to remedy serious racial imbalance in the construction trades, particularly in Roxbury, Dorchester, and South End, where minorities constitute approximately forty per cent of the population, and yet only about four per cent of the membership of buildings trades unions and where there has been a long history of racial discrimination in those unions. Such an imbalance within the relatively lucrative, highly visible, and expanding construction trades undermines efforts at achieving equal opportunity elsewhere in the economy, and contributes to racial tensions."

Similarly, there is a compelling state interest to eliminate the gross underrepresentation of minorities in the legal profession. The law school's efforts to remedy this imbalance should also be upheld.

The issue of whether the law school engaged in past discriminatory admissions policies received insufficient

attention by the courts below. Neither party to this action had any incentive to present evidence on the issue. A finding of any past discrimination would certainly have been detrimental to petitioner's cause, and therefore no assertion of such discrimination was made by petitioner. The law school, in responding to petitioner's allegations did not *sua sponte*, admit to any past discrimination, except to recite racial statistics for its 1969 school year, showing that 8 out of the 356 students enrolled were black.[6]

There does exist, however, a body of statistical data on the participation of minority group persons in the legal profession as law students, lawyers, or judges—which demonstrates with irrefutable clarity that minorities are grossly underrepresented. The use of unnecessarily rigid admissions criteria, weighted heavily towards use of standardized tests and mechanical scores, may have served to restrict minority applicants access to law schools, the first essential step towards participation in the legal profession. Essentially the statistical evidence[7] shows that less than

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[6] Defendant's Exhibit No. 7.

[7] REPORT OF BLACK LAWYERS AND JUDGES IN THE UNITED STATES, 1960-1970, 91st Cong., 2d Sess., 116 Cong. Rec. 30786 (1970); UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, GENERAL POPULATION CHARACTERISTICS OF THE STATE OF WASHINGTON, Tables 17 and 18 (1970); 1971 *Survey of Minority Group Students in Legal Education*, 24 JOURNAL OF LEGAL EDUCATION 487 (1972); Morris, *Equal Protection, Affirmative Action, Racial Preference in Law Admissions*, 49 WASH. L. REV. 1 (1973); Atwood, *Survey of Black Law Student Enrollment*, 16 STUDENT LAWYER JOURNAL 18 (June, 1971); *Blacks and the Law*, 407 ANNALS, AM. ACAD. POL. & SOC. SCIENCE 147 (May, 1973); Toles, *Black Lawyers and Judges in the United States*, 16 STUDENT LAWYER JOURNAL 24 (June, 1971); UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, CHARACTERISTICS OF POPULATION, WASHINGTON, Vol. 49, Tables 120, 122 (1960); UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DIGEST OF EDUCATIONAL STATISTICS, Table 94 (1972). UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, Tables 248, 250 (1971).

one percent of all lawyers in the State of Washington are black and that only slightly over one per cent of all lawyers in the nation are black. Although statistical evidence is less clear on participation of minorities in law schools, the percentages of minority lawyers are relevant and reflect past law school admissions policies because access to law school is the first step in entering the profession. Only in recent years, through affirmative action programs such as that challenged herein, have minority persons begun to gain access to the legal profession.

Statistical evidence showing racial disparity has been readily acknowledged by this Court and the lower federal courts as sufficient to establish a *prima facie* case of discrimination. In *Turner v. Fouche*, 396 U.S. 346 (1969), this Court supported the use of statistics to establish a *prima facie* case of jury discrimination. Further, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971) this Court stated:

> "[W]here it is possible to identify a 'white school' or a 'Negro School' simply by reference to the racial composition of teachers and staff . . . a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown."

By this test, the respondent law school was a "white school" based upon its 1969 racial statistics. In *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), the plaintiff therein did not offer any proof of individual instances of discrimination but relied on statistical evidence which the court held established a *prima facie* case of discrimination. Other cases relying on statistical data as *prima facie* support for the inference that racial discrimination has resulted in racial imbalance include: *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950

(1972); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert, denied*, 404 U.S. 984 (1971); *Hobson v. Hansen, supra. Cf. Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), where it was held that statistics showing severe racial imbalance established, as a matter of law, a case of discrimination.

Herein, the statistics which demonstrate the gross underrepresentation of minorities in the legal profession nationally and in the State of Washington raise the presumption that minority persons have been discriminated against in admission to the law school.

It is not relevant to a determination of past discrimination that the law school may not have *intended* to discriminate in its admissions policies, if the effect of its policies was to unnecessarily restrict access of minority persons to the law school. This Court and lower federal courts have enunciated that proof of intent to discriminate is not required to establish discrimination. *Griggs v. Duke Power Co., supra* at 432 (1971); *Local 189, Papermakers v. United States*, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Clark v. American Marine Corp.* 304 F. Supp. 603, 607 (E.D. La. 1969); *Clark v. H. K. Porter Co.*, 296 F. Supp. 40, 115 (N.D. Ala. 1968); *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413, 448 (S.D. Ohio 1968).

Nor is it relevant that much of the statistical evidence on minority persons' participation in the legal profession is not specifically concerned with the respondent law school. In declaring that the use of certain tests discriminated against blacks in *Griggs v. Duke Power Company, supra*, this Court cited two Equal Employment Opportunity Commission (hereinafter referred to as EEOC) decisions involving the use of the same tests, but by different companies, as those used by the Duke Power Company.

The EEOC in each instance found use of the tests discriminatory. Also, the Court in *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, *aff'd in relevant part*, 472 F.2d 631 (1972), *rehearing denied*, 472 F.2d 631 (9th Cir., 1973) relied on national statistics rather than specific company statistics, in determining the company had discriminated. *See also Johnson v. Pike Corp.*, 332 F. Supp. 490 (C.D. Calif. 1971). General knowledge, unrelated to a specific employer, that minority persons score lower on general aptitude tests than whites was relied on as evidence of discriminatory effect in *Griggs v. Duke Power Co., supra; Arrington v. Mass. Bay Transportation Authority, supra;* and *Hobson v. Hansen, supra.*

Once past discrimination is established, specific numbers, percentages, and ratios have been written into remedies, as part of the courts' general equity powers. Although the formulas vary, they all have as their goal the elimination of the effects of discrimination and they are used as a remedial step. In the school desegregation area, this Court, in *Green v. County School Board*, 391 U.S. 430 (1968) imposed the burden upon school officials of coming "forward with a plan that promises realistically to work, and promises realistically to work now." *Green, supra*, at 439. Furthermore, that intentional, official consideration of race is permissible when necessary to remedy past discrimination and to assure equal opportunity has been made clear by this Court and lower federal courts in cases determining which children shall attend a specific public school, *Swann v. Charlotte-Mecklenburg Board of Education, supra;* in selecting grand juries, *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966); tenants for public housing, *Otero v. New York City Housing Authority*, 42 U.S.L.W. 2185 (2d Cir. Sept. 12, 1973); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); and

school administrators, *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970).

Official recognition of race, similar to that by the University of Washington law school, has been upheld as constitutional in two contexts where a need has been shown to increase minority participation because past discrimination has resulted in underrepresentation. First, lower courts have been upheld in ordering remedial action "which will so far as possible eliminate the discriminatory effects of the past . . .," *Louisiana v. United States*, 380 U.S. 145, 154 (1965). Remedial action approved by courts includes ordering unions to grant immediate membership to a specific number of qualified minority applicants, *United States v. Wood, Wire and Metal Lathers International Union, Local No. 46*, 471 F.2d 408 (2d Cir. 1973), *cert. denied*, 41 U.S.L.W. 3645 (U.S. June 12, 1973); to fill 30% of a union's future apprentices for each class of workers with blacks, *United States v. Ironworkers Local 86, supra;* to match normal referrals on an alternating (one-for-one) basis until a specific objective has been obtained, *Heat and Frost Workers, Local 53 v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); to hire one minority worker every time two white workers were hired, up to a certain number, *Carter v. Gallagher, supra;* and to give priority in future hiring to black and Spanish-speaking applicants for police positions, who had failed to measure up to a constitutionally impermissible set of hiring standards, *Castro v. Beecher, supra.*

Th second context involves cases challenging federal affirmative action plans. Specific percentage goals and timetables for minority hiring were approved in the Philadelphia Plan, *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S.

854 (1971); the Cleveland Plan, *Weiner v. Cuyahoga Community College District*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970); and the Illinois Ogilvie Plan, *Southern Illinois Builders Ass'n v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd* 471 F.2d 680 (7th Cir. 1972). Further, contract provisions imposed by the Commonwealth of Massachusetts requiring each contractor on a certain project to take "every possible measure" to employ not less than twenty percent minority workers in each job category was upheld in *Associated General Contractors v. Altshuler, supra.*

In each of the employment cases cited *supra*, the requirement that a qualified minority be hired necessarily reduced the number of positions available to whites (similarly when majority persons were given preference, slots for minority persons were reduced) even though no court has ordered that a white currently employed be fired to make room for a minority employee. Similarly, in the case herein, acceptance of a minority applicant to one of the limited number of positions available in the first year class reduces by one the number of positions available to white applicants. But no white student already admitted is displaced by the law school's admissions policies.

By analogy to the employment cases set out above, it is permissible for the law school to consider race as a factor in selecting qualified members of minority groups for admission. Indeed, if the issues had been presented to the courts by minority group members who had been discriminatorily denied access to the school, it would be the duty of the court to remedy the past discrimination by requiring affirmative action similar to that voluntarily taken by the school.

The law school found itself in the same position as the craft unions—with minorities grossly underrepre-

sented—and determined that only affirmative action of the kind ordered by the courts in the cases above could remedy this underrepresentation. And the law school undertook such action without the necessity of a court order. The fact that the law school sought to voluntarily remedy the situation prior to any suit being brought against it does not make the law school's action violative of the equal protection clause.

B. Although the Law School's Minority Admissions Policy May Not Be REQUIRED by the Equal Protection Clause of the Fourteenth Amendment, the Constitution PERMITS This Exercise of the School's Discretionary Powers To Remedy Any Racial Discrimination.

It is essential in this case to keep the issue in focus: the question is not whether the equal protection clause of the fourteenth amendment *requires* the law school to take affirmative action to eliminate segregation, but whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy. In answering this question, the *de jure—de facto* segregation distinction becomes unimportant, because the discretionary power of public authorities to remedy any racial discrimination is broader than that of the judicial branch. In *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 16, this Court stated:

> ". . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. *Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary.* Judicial authority enters only when local authority defaults.
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example,

that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*" (Emphasis added.)

In *Katzenbach v. Morgan*, 384 U.S. 641 (1966) the Attorney General of the State of New York argued that the Voting Rights Act of 1965 could not be sustained as appropriate legislation to enforce the equal protection clause unless the judiciary decides that the state action prohibited by the act of Congress is forbidden by the equal protection clause itself. This Court disagreed with the New York State Attorney General stating at page 653 that:

> ". . . it was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."

Both the *Swann, supra,* and *Katzenbach, supra,* decisions point out that what is *permitted* by the fourteenth amendment is much broader than what is *required* by the fourteenth amendment, and that while the courts may be unable to act until a violation of the Constitution occurs, other decision-making bodies within our society are not so limited. Thus, school boards, Congress and other public authorities can remedy problems as they perceive them and implement solutions without violating the Constitution. Here, the law school responded to the problem of racial imbalance in the law school, and the legal profession, by increasing the number of qualified minority students ad-

mitted. Whether the discrimination was *de jure*, thus *requiring* affirmative action, or *de facto*, *permitting* affirmative action, the law school's admission policy is not violative of the equal protection clause of the fourteenth amendment.

That voluntary action is permissible, even though not necessarily required by the equal protection clause is exemplified by case law. Voluntary action taken by the city school board in *Porcelli v. Titus*, *supra*, to integrate the system's administrative staff of principals and vice-principals was upheld as not in violation of the fourteenth amendment. In that case, a group of white teachers alleged that the board gave preference to black candidates by suspending the ordinary promotion system. The superintendent then presented recommendations for appointments of principals and vice-principals, candidly admitting that color was a prime factor, but not the only factor, as only qualified individuals were included in the recommendations. The court stated at page 1257:

> "State action based partly on considerations of color, when color is not used *per se*, and in furtherance of a proper governmental objective [integration of faculties], is not necessarily a violation of the Fourteenth Amendment."

Similarly, the law school considered race, but admitted only qualified applicants to its program.

The Court of Appeals for the Second Circuit in *Offermann v. Nitkowski*, 378 F.2d 22 (1967), in refusing to enjoin school officials from implementing a plan to eradicate *de facto* school segregation by use of explicit racial classifications, stated at page 24:

> "That there may be no constitutional duty to act to undo *de facto* segregation, however, does not mean that such action is unconstitutional."

The court further stated:

> "Where [consideration of race] is to insure against, rather than promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." *Offermann, supra*, at 24.

See also Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); *Deal v. Cincinnati Board of Education*, 369 F.2d 55, 61 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); and *Wanner v. County School Board of Arlington County*, 357 F.2d 452, 455 (4th Cir. 1966).

A statute of the Illinois legislature requiring school boards to revise attendance units in school districts to eliminate racial separation of children in public schools, whether *de jure* or *de facto*, was upheld by the Supreme Court of Illinois against an attack which urged that the requirement that race be considered a factor violated the equal protection clause of the fourteenth amendment. *Tometz v. Board of Education*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968). In reaching its decision the court surveyed cases concerning state laws or administrative policies of school boards or other public authorities, directed towards reduction or elimination of *de facto* segregation of children in public schools, and found that such policies have been approved by every high state court which has considered the issue.[8]

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[8] New York - *Addabbo v. Donovan*, 16 N.Y.2d 619, 261 N.Y.S.2d 68, 209 N.E.2d 112 (1965), *cert. denied*, 382 U.S. 905 (1965); Pennsylvania - *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967); Massachusetts - *School Committee of Boston v. Board of Education*, Mass., 227 N.E.2d 729 (1967), *appeal dismissed* (for want of a substantial federal question), 389 U.S. 572 (1968); New Jersey - *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965); *Morean v. Board of Education*, 42 N.J. 237, 200 A.2d 97

(Footnote continued on following page)

The Washington Supreme Court in *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn. 2d 121, 128 (1972), stated:

> "Reason impels the conclusion that, if the constitution supports court directed mandatory bussing to desegregate schools in a system which is dual 'de jure', then such bussing is within the appropriate exercise of the discretion of school authorities in a system which is dual 'de facto'."

Similarly, in the case herein, where a court could order affirmative action if the lack of minority persons attending the law school resulted from *de jure* segregation, the law school ought to be permitted to continue its voluntary affirmative action to remedy any racial discrimination.

C. It Is the National Public Policy to Encourage or Require Affirmative Action to Eliminate Any Racial Discrimination in Our Society.

To hold that the equal protection clause of the fourteenth amendment does not permit the law school to remedy any racial discrimination through its minority admissions policy would be to reject the thrust of this nation's public policy expressed by Congressional Act, Presidential Executive Orders, and the rules and regulations of federal departments and agencies which encourage or require affirmative action to eliminate racial discrimination in our society.[9] Congress, in Title VI of the Civil

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(1964); California - *Jackson v. Pasadena City School District*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P.2d 878 (1963); Washington - *State ex rel. Citizens Against Mandatory Bussing v. Brooks*, 80 Wn.2d 121, 492 P.2d 536 (1972); *see also Guida v. Board of Education of City of New Haven*, 26 Conn. Sup. 121, 213 A.2d 843 (1965).

[9] Such national policy has been undertaken to reverse the apartheid policy our country adhered to prior to *Brown v. Board of Education*, 347 U.S. 483 (1954) and supported by *Plessey v. Ferguson*, 163 U.S. 537 (1896).

Rights Act of 1964, Section 601, 42 U.S.C. §2000d, stated that:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In the next section of the same act, which petitioner failed to recite in his brief p. 27, Section 602, 42 U.S.C. §2000d-1, Congress directs that:

> "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of Section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders. . . ."

Pursuant to this Congressional directive, various departments have issued such rules and regulations. The University of Washington, and the law school, as recipients of Federal financial assistance, must abide by the rules and regulations of the Department of Health, Education and Welfare (HEW), which administers the assistance programs benefiting them. To effectuate the provision of Title VI quoted above, the Department of HEW promulgated regulations published at 45 C.F.R. 80.1 *et seq*. These regulations stated in relevant part:

> "§80.3 (b) (6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effect of prior discrimination.
>
> (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of con-

ditions which resulted in limiting participation by persons of a particular race, color, or national origin.

§80.4(a) Every application for . . . assistance . . . shall . . . contain . . . an assurance that the program will be conducted . . . in compliance with all requirements imposed by or pursuant to this part.

(d) (1) In the case of any application for Federal financial assistance to an institution of higher education . . . the assurance required by this section shall extend to admission practices . . .

§80.5(i) [If the effects of past discrimination still exist, an applicant may be required to take additional steps such as making] special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) [Even if an applicant has never discriminated, but its services are not equally available to minority persons] an applicant or recipient may properly give special considerations to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served."

In considering various sections of HEW's regulations to effectuate Title VI, courts have held that great weight should be given to them. *United States v. Jefferson County Board of Education*, 372 F.2d 836, 847 (1966), *modified en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967). The Court, *en banc*, stated at page 390 that:

"These [HEW] guidelines and our decree are within the decisions of this Court, comply with the letter and spirit of the Civil Rights Act of 1964, and meet the requirements of the United States Constitution."

See also Griggs v. Duke Power Co., supra. The Court did not reach the question of the applicability of the Guidelines to *de facto* segregation, however, because that

situation was not presented. *See also Gardner v. State of Alabama, Dept. of Pensions and Security*, 385 F.2d 804 (5th Cir. 1967), *cert. denied*, 389 U.S. 1046 (1968).

The law school is required by HEW's Guidelines to take affirmative action to increase the numbers of minority persons in its classes, whether or not the underrepresentation has been caused by *de jure* or *de facto* segregation. Failure to take such action could result in a termination of receipt of Federal financial assistance. 45 C.F.R. 80.8. The law school's admissions policy is an appropriate response to assure that it is in compliance with HEW's regulations.

Affirmative action plans have also been required under rules adopted pursuant to Presidential Executive Order 11246, 3 C.F.R. 339, mandating equal employment opportunity by government contractors, and Presidential Executive Order 11478, 3 C.F.R. 133, mandating equal employment opportunity for federal employees. Order 11246 is administered by the Secretary of Labor, while Order 11478 is enforced by the United States Civil Service Commission.

The Secretary of Labor established the Office of Federal Contract Compliance (OFCC) to administer Executive Order 11246. OFCC has issued regulations requiring recipients of both federal procurement (41 C.F.R. 60-2.1 *et seq.*) and federally assisted construction contracts (41 C.F.R. 60-1.1 *et seq.*) not only to assure the government that they will not discriminate, but also to undertake affirmative action to assure that non-discriminatory practices are followed. In the construction area, to coordinate compliance efforts of each federal agency, the OFCC developed area plans requiring detailed affirmative action. Plans have been upheld in several cases including *Contractors Ass'n of Eastern Pennsylvania v. Shultz, supra*, and *Southern Illinois Builders Ass'n v. Ogilvie, supra*.

The goal of the affirmative action plans required by the OFCC is to promptly eliminate any situation where there is underutilization of minority persons. This is also the goal of the affirmative action plans required of each federal agency under rules and regulations issued by the United States Civil Service Commission pursuant to its responsibility under Order 11478. 5 C.F.R. 713.

Thus, the federal government has recognized the utility of the use of affirmative action plans to eliminate any racial discrimination, requiring the recipients of federal grants or contracts, including state universities, to take affirmative action to eliminate the effects of bias. The law school should not be held to have violated the law because it voluntarily undertook to eliminate racial discrimination.

The goal of affirmative action has been to eliminate the effects of discrimination without attempting to assign blame to anyone. Where statistical evidence shows that minority persons are underrepresented, for whatever reason, affirmative action is essential in correcting the effects of past discrimination. Thus, statistical evidence showing that minority persons are underrepresented in the construction crafts led to OFCC's requirement of affirmative action. Underrepresentation in federal agencies led to the United States Civil Service Commission's requirement of affirmative action. Similarly, the law school recognized the underrepresentation of minority persons in its law classes and the legal profession, and determined to eradicate this underrepresentation by taking affirmative action to increase the number of minority students admitted. The law school's action is consistent with the public policy of this nation.

CONCLUSION

The admission to and graduation from a law school is both an educational experience and, in most instances, a prerequisite to subsequent employment as a licensed attorney. The Supreme Court of Washington found that the State had several compelling interests in these areas that warranted the admissions policy utilized by the University of Washington. Initially, a state has a valid interest in promoting integration in its publicly supported educational facilities. Further, there may legitimately exist a concern that the composition of a law school reflect the make up of the community into which its graduates will enter.

Today, the ratio of minority groups in many metropolitan areas is increasing, but without a policy of encouraging greater representation in the legal profession, there will not be sufficient minority lawyers who because of their specialized skills can vocalize the needs of the communities. Realistically, the presence of attorneys who are members of the majority group or attorneys of another minority class is not an adequate substitution when factors such as language barriers and ethnic experience are considered. Finally, underrepresentation in the legal profession, unlike the other professional disciplines, has a farther reaching effect in our system. Disproportionate numbers of minority lawyers multiplies throughout our federal, state and local governmental institutions resulting in inadequate representation in all levels of government.

In conclusion, we urge this Court to affirm the decision of the Supreme Court of Washington. However, if this Court feels that it cannot reach the merits of the case in the absence of additional evidence of past discrimination in this record, it could vacate the order of the Supreme Court of Washington and remand the case back

for a further determination of whether past discrimination existed and with specific guidelines for the lower court on the kind of evidence which should be considered in reaching the determination.

Respectfully submitted,

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FEB 1 1974
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IN THE

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OCTOBER TERM, 1973

No. 73-235

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CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON, ET AL., *Respondents.*

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For the National Council of Jewish Women; the Union of American Hebrew Congregations, Commission on Social Action; the International Union, United Automobile, Aerospace, Agricultural Implement Workers of America (UAW); the United Mine Workers of America (UMWA); the International Union, American Federation of State, County and Municipal Employees, AFL-CIO; the United Farm Workers of America; the Massachusetts Institute of Technology; Robert C. Wood, President, University of Massachusetts; the United Negro College Fund, Inc.; the Americans for Democratic Action; the Center for Community Change; the Center for National Policy Review; the Japanese Americans Citizens League; the National Urban Coalition; the National Urban League; the Southern Christian Leadership Conference; the University of Notre Dame Center for Civil Rights; and the Children's Defense Fund of the Washington Research Project, Inc.

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INTRODUCTION

We present this brief in support of the respondents with the consent of counsel for both the petitioners and the respondents.

We rely on the respondents' treatment of this Court's jurisdiction, of the opinions below and of the constitutional and statutory provisions involved.

QUESTION PRESENTED

Whether the Fourteenth Amendment of the United States Constitution forbids a discretionary admissions process whereby a State University Law School affirmatively seeks qualified students from racial minority groups, when such groups have long been victims of racial discrimination and had only token membership in the Law School and the legal profession.[1]

INTEREST OF AMICI

Amici—in the area of religious, labor union, university affairs, and civil rights as well as in the area of public policy—have a long standing involvement with issues of equal opportunity.

The Commission on Social Action, long dedicated to the promotion of equality of opportunity, is a joint

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[1] The constitutional question is the only one properly before this Court. The question under Title 42, U.S.C. 2000(d) was not presented to the trial Court in this case; thus it was not considered by the Supreme Court of Washington; and thus it may not be considered by this Court. See the Respondents' "Motion of Dismissal of Appeal or, in the alternative, Affirmance of the Judgment Below and Statement in Opposition to Certiorari," at page 2, footnote *.

Even if the question under Title 42, U.S.C. 2000(d) were properly before this Court, the claim of petitioners would have no merit. The statute must be interpreted in light of the Department of Health, Education and Welfare Regulations drawn to enforce it. *Lau* v. *Nichols*, 42 U.S.L.W. 4165. Those regulations quite plainly approve affirmative admissions policies such as that adopted by the University of Washington Law School. See 38 F.Reg. 17,979; § 80.3(b)(6)(ii).

instrumentality of the institutions of Reform Judaism in America, including the Union of American Hebrew Congregations and the Central Conference of American Rabbis. The UAHC is the central body of Reform Judaism, serving 710 synagogues throughout the country with a membership of approximately one million persons.

The National Council of Jewish Women was established in 1893 and has consistently maintained an interest in civil rights. It is one of the organizations that has strongly supported civil rights legislation and is continuing to monitor the enforcement of the civil rights laws.

The UAW is the largest industrial union in the world, representing approximately a million and a half workers and their families. Including wives and children, UAW represents more than 4½ million persons throughout the United States and Canada. The UAW, which is deeply committed to equal opportunity and anti-discrimination, does much more than bargain for its members. It is active in civic affairs and citizenship and legislative activities. It is by mandate of its Constitution and tradition deeply involved in the larger issues of the quality of life and the improvement of democratic institutions. The questions presented by this case vitally affect the UAW and its members.

The United Mine Workers of America is a labor organization representing coal miners. Throughout the United States the UMWA has historically been in the forefront of the nation's struggle for equal opportunity employment and is dedicated to the principle of equal opportunity in every walk of American life.

The International Union, American Federation of State, County and Municipal Employees, AFL-CIO, is

a labor organization with a membership of more than 650,000 persons, almost all of whom are employed by state and local governments throughout the nation. AFSCME is deeply concerned about the achievement of equality in America. Its members, as public employees both white and black, are committed to the principle of affirmative action and are particularly conscious of the importance of affirmative action toward equal opportunity by public institutions.

The United Farm Workers of America is an unincorporated association which functions as a trade union on behalf of farm workers. In addition to its interest in wages, hours, and working conditions, it is vitally interested in the social betterment of its members and particularly in their obtaining higher educational opportunities.

As a means to assure the equality of opportunity in the professions and career pursuits in our society, the Massachusetts Institute of Technology is committed, through its student recruitment policies and through its educational program, to increasing the interest, preparation and availability of minorities for careers in science and technology.

Robert C. Wood is President of the University of Massachusetts, a public, state-supported educational institution of 30,500 students with campuses at Amherst, Boston and Worcester, Massachusetts. Dr. Wood was formerly Under Secretary and Secretary of the United States Department of Housing and Urban Development, and was also Director of the Joint Center for Urban Studies of M.I.T. and Harvard. As a University President, Dr. Wood now has had special experience with, and concern for, efforts to ensure equal opportunity in the admissions process.

The United Negro College Fund, Inc., is an organization consisting of 41 member colleges, all but one of them in the South, which was established in 1944 to raise funds and provide other assistance to member colleges. The Fund is vitally concerned to ensure equality of opportunity in admissions to graduate and professional schools.

The Americans for Democratic Action, founded in 1947, is an organization of individuals that has devoted itself to the cause of civil rights for all. Over the past two decades, it has worked for the enactment of civil rights legislation and for the promotion of equal opportunity through every branch of government.

The Center for Community Change, incorporated in 1968, is a District of Columbia non-profit corporation. Among its purposes are activities aimed at "improvement of the condition of the poor, the underprivileged and the alienated." The Center's work with dozens of community organizations representing minorities has made it aware of the effects of past discrimination and the need for affirmative actions to aid its victims.

The Center for National Policy Review on race and urban issues is a public interest law center located at Catholic University Law School and supported by foundation grants. Since 1970, the Center has provided assistance to civil rights and other public interest organizations seeking fair and vigorous implementation of Federal laws designed to protect the rights and interests of racial minorities. The Center's help takes the form of research, technical assistance and legal representation in rule-making or other Federal agency proceedings. In employment, education, housing and other areas the work of the Center has been directed toward the adoption by Federal agencies of

affirmative action policies to undo the effects of past racial discrimination. The Center also maintains a legal intern program where students from several law schools have an opportunity for practical as well as academic involvement in civil rights issues. This program and the overall objectives of the Center have benefitted substantially from the participation of minority law students.

The Japanese American Citizens League (JACL) is a national organization comprised of 96 local chapters with over 27,000 members in 32 states. Since its official organization in 1930, JACL has been dedicated to the promotion of the welfare of its members and to the broader goal of the protection of the rights of all Americans. Having suffered through one of the most intense periods of discrimination in the modern history of the United States—the exclusion of over 100,000 persons of Japanese ancestry from the West Coast during World War II—Japanese Americans are acutely aware of the potentially invidious and unjust consequences of governmental programs based exclusively upon race. However, JACL is joining in this brief because it believes that it is imperative that affirmative efforts be made to increase educational opportunities for individuals who are disadvantaged in our society because they are members of minority races that have been traditionally discriminated against and denied access to the advantages of American society.

The National Urban Coalition is an organization whose purpose is to improve opportunities and conditions of life for citizens living in urban areas of the nation. Founded in 1967, it has 32 affiliated local coalitions and representation from corporations,

unions, religious, and civil rights organizations. The improvement of educational opportunity is among its prime purposes and to that end it has sponsored educational research and participated as *amicus curiae* in cases involving the equal distribution of educational resources.

The National Urban League, Inc., is a charitable and educational organization organized as a not-for-profit corporation under the laws of the State of New York. For more than 63 years the League and its predecessors have addressed themselves to the problems of disadvantaged minorities in the United States by improving the working conditions of blacks and other minorities, by fostering better race relations and increased understanding among all persons, and by implementing programs approved by the League's interracial board of trustees. The League has concluded from its experience in manpower training, placement of minority professionals, and other employment related programs that special measures are usually required to overcome the damage done by long-term racism and prejudice. The selection process used by the University of Washington Law School to ensure reasonable representation of minorities among its students and, ultimately, the legal profession is consistent with the methods and goals of the League to purge society of the effects of discrimination. The League joins in this brief in the belief that it will further its long-standing goals.

The Southern Christian Leadership Conference was established in 1958 by Dr. Martin Luthern King, Jr. In the ensuing years, SCLC has taken a prominent role in support of civil rights, both in the South and throughout the nation. It is committed to equal

opportunity in education at all levels, including graduate and professional schools.

The University of Notre Dame Center for Civil Rights was established in 1973 to continue in the private sector the commitment toward achieving equality for all Americans which the Reverend Theodore M. Hesburgh, C.S.C., President of the University, pursued for fifteen years as a member and then Chairman of the United States Commission on Civil Rights. The Center for Civil Rights is a resource for research into the United States' recent civil rights history; it engages in analysis of current civil rights issues, and it attempts to recommend viable solutions to civil rights problems. The Center is intimately familiar with the history and current extent of discrimination in this country and the legal and moral issues involved in eradicating this blight. The Center, moreover, is associated with a major university and is directly interested in ensuring that universities retain the administrative flexibility to undertake effective affirmative action to enroll and educate minority group students. It regards this case as probably the most important civil rights case to reach this court since *Brown* v. *Board of Education*. The following members of the Advisory Council of the Center for Civil Rights join in support of this brief: Reverend Theodore M. Hesburgh, Chairman; Berl I. Bernhard, partner in law firms in Washington, D.C., New York and former Staff Director of the U.S. Commission on Civil Rights; Marian Wright Edelman, Director of the Children's Defense Fund; Oscar Garcia-Rivera, Professor, Hofstra Law School and Chairman of Aspira of New York, Inc.; Earl G. Graves, Earl G. Graves Publishing Company; M. Carl Holman, Presi-

dent, National Urban Coalition; Kenneth Keniston, Professor, Yale University; Burke Marshall, Deputy Dean, Yale Law School; William May, Chairman of the Board, American Can Company; Grace Olivarez, Director, Institute for Social Research and Development, University of New Mexico; William L. Taylor, Center for National Policy Review and former Staff Director, U.S. Commission on Civil Rights; Professor Lester C. Thurow, Massachusetts Institute of Technology; Harris Wofford, President, Bryn Mawr College; and Howard A. Glickstein, Director of the Center, and former General Counsel and Staff Director of the U.S. Commission on Civil Rights.

The Children's Defense Fund of the Washington Research Project, Inc., was established in 1968. Its principal aim is to assist in achieving equality of opportunity for all citizens through litigation and negotiation and monitoring of administrative agency programs. The Project has long been deeply concerned with educational issues, particularly with alleviating the continuing effects of racial discrimination in public schools. It has conducted a number of studies of federal desegregation policies and the impact of federal aid to education programs, relating to higher education as well as primary and secondary education, to ensure that the national commitment to end discrimination is fulfilled. In 1973, the Project complemented these efforts with a broader focus on children's rights, seeking systematic reforms on behalf of all the nation's children, but with special attention to the special problems of minority and poor children. The Project's work to vindicate the rights of all children depends, first, on eliminating the vestiges of discrimination against particular children at all levels of public education.

STATEMENT OF THE CASE

This is not a racial "quota" case. Nor does it involve "reverse discrimination." The facts of this case are a good deal more complex.

When in the Summer of 1971, the Petitioner—along with about 1,300 others—was denied admission to the University of Washington Law School, he brought this lawsuit. At issue now is the School's traditionally discretionary admissions process, used to seek students from racial minority groups. Before setting out the elements and application of that process, it is worthwhile to describe the chain of events, adduced at trial, that led the Law School to adopt it and that led the Petitioner to attack it.

A.

The Petitioner, Marco DeFunis, twice applied, in 1970 and 1971, for admission to the University of Washington Law School. Twice he was denied admission. Both times he applied to other nearby law schools as well. Both times he was admitted to other law schools, in the State of Oregon and in the State of Washington. (St.[2] 13, 21, 23.) But DeFunis preferred the University of Washington. (St. 21.) He set about to challenge its decision not to admit him.

In June of 1971, DeFunis' parents obtained counsel and contacted the Law School Admissions Committee. They submitted letters from DeFunis' mother and doctor indicating that he had been ill at the time he

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[2] "St." refers to the Statement of Facts, the portion of the record before this Court containing the transcript of the proceedings before the King County Superior Court.

took the first of three Law School Aptitude Tests. They did not, so far as the record shows, even mention the Law School policy toward racial minorities. The Admissions Committee gave special reconsideration to DeFunis' application; but it reaffirmed its decision not to admit him. (St. 355-356.)

At about the same time, DeFunis' parents, accompanied by counsel, arranged a meeting with members of the University Board of Regents. Again, so far as the record shows, they did not mention the University's policy toward racial minorities. Rather, they "explained . . . what good grades [DeFunis] had had and how [he] applied and had been turned down or put on the waiting list, and one thing and another, and just asked the regents to consider the situation and see what, if anything, they could do about it." (St. 115.) As a result of this meeting, members of the Board of Regents met with representatives of the Law School to discuss DeFunis' application, but they came away "satisfied" with the Law School's decision not to admit DeFunis. (St. 116.)

Not long thereafter, DeFunis brought suit against the University in the King County Superior Court. Again, his main argument was that, on the basis of his grades and test scores alone, he deserved admission to the Law School. His counsel told the Superior Court: "We are not really attacking a minority program. Our position here is that the law school is admitting students . . . with lower grades and lower qualifications than the plaintiff in this case . . . We care not whether [those admitted with lower grades and scores] are minority students or whether they are not minority students, and some of them are not. . . . Why are we concerned with the efforts of the University to in-

augurate some minority program for minority students, I don't know. I do not believe that it is what we are talking about in this trial." (St. 230.)

Nevertheless, the trial soon did focus on the University's affirmative policy to seek students from racial minorities. The Superior Court held that policy to be unconstitutional. It ordered the Law School to admit DeFunis. The Supreme Court of Washington reversed this holding and order. But, on June 5, 1973, Mr. Justice Douglas stayed execution and enforcement of its judgment; and DeFunis is now in his third year at the University of Washington Law School.

B.

The racial minority policy, now the crux of this case, is not one confined to this Law School or to this University. It was not adopted suddenly; nor was it adopted only recently. Rather, it is a University-wide policy, similar to policies at Universities all over the country, adopted voluntarily, after careful thought and study, almost ten years ago. At trial, University President Charles Odegaard testified about its genesis.

When Odegaard became the President of the University of Washington in 1958 he encountered a "claim of religious discrimination [in University admissions], and there were references, also, to racial [discrimination]." (St. 221.) After a review of the problem, the University issued a general statement committing itself to an entirely "non-discriminatory" admissions policy, "what I suppose you would call an open-door." (St. 222.) President Odegaard testified

that "most of us, at the time, felt that the University policy was clear and was sufficient as it was announced in 1959." (St. 222.)

But several years later, as the eyes of all Americans opened to the lasting damage done by more than two centuries of discrimination against racial minorities, President Odegaard saw the matter differently. He testified:

> "At Commencement in 1963, . . . a large number of students, [from] all the schools and colleges granting degrees at the University, . . . filed by. I walked out with the regents following immediately after me, and we went into the area where we changed from academic garb to conventional street clothes. As soon as we got in there, the question was raised— . . . 'Where are the black students? Where are the black students?' There were so few that appeared . . . With our open-door policy, we had so few that seemed to be coming through. If they cannot go through these halls and acquire the kind of educational background required for many of the roles in society, they obviously are not going to share more fully in the American way of life and feel a part of the society into which they have been born."

(St. 222-223.)

Shortly after the 1963 Commencement, President Odegaard appointed a faculty committee to determine why the University of Washington had no more than a few students from racial minority groups and what could be done about it. (St. 223.) It became clear that, despite the University's non-discriminatory posture, minority students were still being excluded because of past discrimination against them in almost

every institution of the society. President Odegaard testified:

> [M]ore and more as we dug into this, we began to realize that there can be a presumption of legal equality or procedural equality at the University but, in fact, [there are] cultural conditions [i.e., present effects of past discrimination] . . . which deter certain persons from acquiring the backgrounds necessary to move into more responsible roles in American life.
>
> So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.
>
> Meanwhile, in the United States of America, there was developing, also, an awareness that something more was needed, and I think the language—we didn't think it up in the beginning—I think it is now the national parlance, 'affirmative action' . . . ."

(St. 223-225.) In 1965 the faculty committee issued its report recommending a more affirmative policy to remedy the exclusion of minorities from the University. (St. 228.)

Between 1965 and 1968 the University began to institute its new policy. In cooperation with the federal Upward Bound Program, the University brought minority "high school students . . . to the campus for eight weeks' special classes." (St. 228.) Many students "were admitted to the University on the basis of what was learned about them, even though, in some

instances, their previous academic records would not have suggested that they were within the conventional limits. . . . [S]o there was the beginning of more discretionary admission in the sense of taking into account . . . data gained by larger measures of personal contact [with minority applicants], awareness of [their] history, [their] motivations and [their] attitudes . . . ." (St. 229.)

C.

The University-wide policy toward racial minorities was adopted by the Law School. The minority groups to which the Law School applied its policy were "Black Americans, Chicano Americans, native Americans, or Indians, and Philippine Americans." (St. 351.) The basis of the selection was that these racial minorities had been subject to pervasive discrimination in America and had had only token membership in the Law School and the legal profession previously; Asian Americans (other than Philippine Americans) were not included because of the "large number of Asian American applications and the significant number that had been accepted in the process of simply the ordinary review of the files." (St. 352.)

The minority policy did *not* represent a sharp break, in method, with the admissions policy applied to other applicants:

> "The policy recognized there was need for [a] large policy of discretion in review of individual cases . . . . That is not something new in the University; the University has always pursued a policy of, in addition to using the conventional credentials, to recognize there may be other information about a candidate which suggests he should or should not be admitted. This is true

> for conventional white students, as well as students from minority backgrounds."

(St. 241.)

The Law School advised applicants that admissions—for minorities and non-minorities alike—were based on considerations other than just grades and test scores. In addition to grades and scores, the School asked them to submit personal recommendations from the Dean of Students or other official of their college, from a faculty member in their major subject, and from anyone else they might wish. (St. 338-339.) And the School specifically stated that applicants would be evaluated "on the basis of their ability to make significant contributions to law school classes and to the community at large." 507 P.2d 1169, 1173.

The School's Admissions Committee treated grades and test scores as important, but as only two of several factors, within a "discretionary" process applied to *all* applications. Initially, it did rank applications into three categories according to their Predicted First Year Averages (P.F.Y.A.), a figure based only on the grades and scores. But this categorization alone did *not* determine acceptance or rejection.

The Admissions Committee reviewed applications showing a P.F.Y.A. over 77 or below 74.5 soon after they came in.[8] Even then, however, it considered much

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[8] The full Admissions Committee reviewed applications in the top category "in groups of 25 or 30" as they were received during the year. (St. 340.) It "delegated" to its Chairman, Professor Richard O. Kummert, the responsibility to make a preliminary review of applications in the bottom category. (St. 340-341.) The "delegation" to the Chairman "did not run to those files presented by minority students" in that category. "Essentially, the committee reserved to itself consideration of all minority files." And all minority applications below the top category were deferred for full review later on, in May. (St. 341.) See text below.

more than the applicants' P.F.Y.A.'s. There was no automatic decision based on numerical criteria. The Committee gave advance acceptance to most in the top numerical category. But it also "deferred judgment on a number of these files." (St. 340.) It sent an advance rejection to many in the bottom numerical category. But in many "cases of doubt" showing qualifications beyond mere grades and scores it deferred these files, too, for later consideration. (St. 342.)

The Committee kept the middle category of applications—along with those deferred from the top and bottom groups—for evaluation in May. (St. 242.) At the time, it closely examined the applicant's qualifications,[4] including many non-grade-and-score considerations such as personal qualities, recommendations, community activities and past experiences. (St. 271, 278-287, 303). On this basis, the Committee finally determined which applicants to accept, which to reject and which to put on a waiting list.

The Committee subjected the applications of racial minority students to the same kind of "discretionary" process of evaluation. In fact, it deferred all minority applications, showing P.F.Y.A.'s below 77, for review in May. (St. 341.) And in May, it considered all of

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[4] Initially, as to the main body of "deferred" applications, the files "were divided and distributed among the committee members, essentially at random." (St. 344). The individual members reviewed the files assigned to them, then discussed them with the full Committee, and the full Committee "debated" about them and sought to reach a general "consensus" on each one. (St. 347.) Although minority applications were also considered by the full Committee, the administrative procedure applied to them at the initial stage was somewhat different. See footnote 5 below.

them together at one meeting.[5] (St. 353.) At that meeting, it put the applicants' P.F.Y.A.'s as well as their non-grade-and-score qualifications into the balance. In many cases, to be sure, it weighed these factors somewhat differently for minority applicants, giving somewhat more emphasis to non-numerical qualifications. The Dean of the Law School, Richard Roddis, testified that, "as to certain minority groups, the [admissions] committee evaluate[d] the qualifications of applicants separately and I think with less emphasis on the undergraduate grade point averages and the L.S.A.T. scores than they [did] with respect to the applicants of the majority groups." (St. 70-71.)

The Committee, however, did *not* abandon its basic standards in admitting minority applicants. (St. 241.) Rather, it continued to examine each one for his or her "probability of succeeding in law school." (St. 353.) For the policy was to give non-grade-and-score factors more weight only to the extent that "there is something in the record of [the] individual which suggests that he has the motivation and capacity . . . to . . . move out of the University at the same level or degree that all other students do . . . ." (St. 242.)

The Committee's exclusive focus, then, was on the overall qualifications of minority applicants. It did *not* have to meet any "quota." Rather, the Law School's policy was based simply on a hope that,

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[5] In May, the files of minority applicants were assigned, for initial review, to two Committee members with special experience and expertise in evaluating applicants with minority backgrounds. (St. 352.) These two members then discussed the minority applications with the full Committee, and the full Committee "debated" about them, as it also did with respect to non-minority applications. See footnote 4 above.

through additional efforts, it could find a "reasonable" number of qualified minority students, to remedy their unreasonable absence from the School in the past. (St. 353, 416, 420.) The number actually admitted thus depended on the qualifications of the individual applicants. The undisputed testimony of University officials at the trial in this case was that *every* minority student admitted was, indeed, qualified for law study. (St. 73, 233-234, 245, 399, 420.)

University officials recognized that *some* minority students chosen by the Admissions Committee presented a somewhat higher risk than *some* other students. But they felt that such relative risks were a normal part of the Law School admissions process, which explicitly based *all* admissions decisions in large part on a "discretionary" evaluation of non-grade-and-score considerations. (St. 234, 418, 423.)

The discretionary" nature of the Law School's admissions process—toward minority and non-minority applicants alike—was clearly revealed in the make-up of the group offered admission in 1971. Because the School did not judge *any* applications by college grades and test scores alone, many applicants were offered admission who had lower grades and/or scores than the unsuccessful applicant, DeFunis. The majority of them were *non*-minority students. Specifically, the Superior Court found that 38 admittees with lower P.F.Y.A.'s than DeFunis were from non-minority groups, while 36 were from racial minority groups (Finding XVI.)[6] Thus about one-quarter of the 300 applicants offered admission were "below" DeFunis

[6] Six of the minority students offered admission had P.F.Y.A.'s *higher* than the Petitioner's.

in terms of purely numerical criteria. Plainly, the Admissions Committee gave significant weight to non-numerical qualifications, and it did so in the cases of non-minority applicants just as in the cases of minority applicants.

Finally enrolling at the Law School in the Fall of 1971 were somewhat over 150 students. Among their number were 18 minority students. (Finding XVI.) Also among their number, pursuant to the court order in this case, was Marco DeFunis.

SUMMARY OF ARGUMENT

This case presents an issue far different from those presented in past "race cases" before this Court. For the University of Washington Law School takes cognizance of race not in order to burden racial minorities, but to remedy the effects of past discrimination against such minorities. The Fourteenth Amendment was never intended to frustrate such remedial efforts.

For this reason, it would be entirely inappropriate to apply the presumption of unconstitutionality, usually applicable to other forms of "racial classification," to this case. This Court has employed such a presumption only in cases involving the stigmatization or inferior treatment of an isolated minority group. The Court has not employed the presumption of unconstitutionality when, as in this case, a racial classification is used to remedy past discrimination.

Moreover, the Court should be particularly cautious in interfering with the Law School admissions process here, because the School's policy to remedy past *de facto* exclusion of minorities was voluntarily adopted. Our principles of federalism counsel judicial restraint.

This case, therefore, should be subjected to a test of "reasonableness"—a test strong enough to prevent "reverse discrimination," but flexible enough to allow efforts by State and local government authorities to remedy the effects of past discrimination. Under that test the University of Washington Law School's admissions policy toward minorities was surely constitutional.

The School's decision to initiate the policy was based on a reasonable perception of the problem of effective exclusion of minorities in the past. The policy was reasonably designed to solve the problem; and it was well within the limits of the School's proper educational concerns.

The scope of the School's policy was eminently reasonable. It was not a "quota." Rather, it involved only the weighing of individual minority students' qualifications within a traditionally discretionary admissions process. The School gave somewhat more weight to qualifications other than college grades and test scores in the cases of minority applicants. But, importantly, it carefully weighed such qualifications in the cases of *all* applicants, minority and non-minority alike; it did not judge *any* applicants by grades and test scores alone. Moreover, the basic standard of qualification for law study applied to minority applicants was no different from that applied to others; every minority student finally admitted was considered fully qualified.

Thus the University of Washington Law School's minority policy was a moderate one, involving only distinctions of degree within an overall process characterized by subtle considerations of personal qualifications in every application.

ARGUMENT

I. THE APPLICABLE LAW: A TEST OF "REASONABLENESS"

A.

This Case Presents a New Issue in the Law of "Racial Classifications." A New Issue Should Be Considered Anew: Broad Language in Past Decisions Should Be Applied Only If It Is Applicable.

The University of Washington Law School admissions process takes cognizance of race. But this is no ordinary "race case." Indeed, in the common sense of the term, this is not a "race case" at all. This case, rather, presents an issue of first impression.

For years, the Court has interpreted the Constitution to condemn the longstanding subjugation of racial minorities in America. It has confronted countless racial classifications used to perpeutate that heritage. But it has almost never confronted a classification used for just the *opposite* purpose. For the first time now the Court faces a voluntarily-adopted process attacked as favoring, rather than harming, a racial minority; a process used to bring the races together, not to set them apart; a process designed, most importantly, to remedy the present effects of past discrimination, not to further entrench them.

To be sure, many of this Court's past decisions have condemned "racial classifications," and even presumed them unconstitutional, in very general terms.[7] But that sweeping language should not be applied in this

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[7] As early as 1896, for example, the Court said that "the Constitution of the United States . . . forbids . . . discrimination by the General Government, or by the States, against any citizen because of his race." *Gibson* v. *Mississippi*, 162 U.S. 565, 591. And, in dissent in a contemporary case, Justice Harlan insisted that the Constitution is "colorblind." *Plessy* v. *Ferguson*, 163 U.S. 537, 552. Such language might appear on its face to condemn

case if it is not applicable in the changed circumstances here. This point was overlooked by both of the courts below.

Both courts read the broad language in past decisions to require inevitably that any and all consideration of race be presumed unconstitutional. The King County Superior Court flatly held that no racial classification can ever be constitutional. "[T]he Fourteenth Amendment [can] no longer be stretched," it said, "to accommodate the needs of any race." Unreported opinion quoted in *DeFunis* v. *Odegaard,* 507 P.2d 1169, 1178. The Washington Supreme Court properly rejected the idea that consideration of race is unconstitutional *per se.*[8] *Id.* at 1179-1181. But it read language in past decisions holding "racial classifications" presumptively unconstitutional to apply to all racial classifications. It reversed the decision of the Superior Court only by holding that the pre-

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all racial classifications, of whatever type, used for whatever purpose.

More recently, using no less sweeping language, the Court has subjected racial classifications to a test with extraordinary force At first, under the Due Process Clause, it stated that "all legal restrictions which curtail the civil rights of a single racial group are immeliately suspect . . . [and] courts must subject them to the most rigid scrutiny." *Korematsu* v. *United States,* 323 U.S. 214, 216. See also *Bolling* v. *Sharp,* 347 U.S. 497, 498. Then, under the Equal Protection Clause, the Court stated that "racial classifications [are] 'constitutionally suspect' " and are permissible only if they are shown to be "necessary" for some "overriding purpose." *McLaughlin* v. *Florida,* 379 U.S. 184, 192, 196. See also *Loving* v. *Virginia,* 388 U.S. 1, 10-11.

[8] The Court has explicitly stated that racial classifications are *not* unconstitutional *per se. Hirabayashi* v. *United States,* 320 U.S. 81, 100; *Korematsu* v. *United States,* 323 U.S. 314, 216, 223. See *McLaughlin* v. *Florida,* 379 U.S. 184, 196; *Loving* v. *Virginia,* 388 U.S. 1, 11. See also *Lee* v. *Washington,* 390 U.S. 333.

sumption could be overcome in this case by a "compelling" justification. *Id.* at 1181-1185.

Both courts erred in their over-reading of the law. Broad language in past opinions need not necessarily govern decision in another case, with substantially different facts. See, e.g., *Kirby* v. *Illinois,* 406 U.S. 682. Holdings are holdings; dicta are dicta; and the two must be distinguished. Or so this Court has always said. See, e.g., *Harris* v. *New York,* 401 U.S. 222, 224.

Thus it is not *inevitable* that all consideration of race must be treated as the same.[9] It is not inevitable that all "racial classifications" must be treated as "suspect" or presumed unconstitutional. A new type of racial classification, different from those considered in the past, used for a different purpose to deal with a different set of practical difficulties, requires new consideration under the language of the Constitution, not simply under the language of previous court decisions.

The seductive power of sweeping words crafted for particular situations is no doubt great. As Mr. Justice Cardozo emphasized in a biting criticism of Fourteenth Amendment interpretation in the heyday of "substantive due process," it is a seduction that can lead courts astray. "Out of the vague precepts of the Fourteenth Amendment," Cardozo wrote, "a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder* v. *Massachusetts,* 291 U.S. 97, 114. This seduction can be resisted in the present

[9] It is pointed out in Section "D" below that the Court has *not* treated all racial classifications as the same or subjected them all to review as "suspect" classifications.

case if it is recalled that: "Equal protection, not color blindness, is the constitutional mandate, and the experience with liberty of contract should caution against an absolute legal criterion that ignores practical realities." Freund, *Constitutional Dilemmas,* 45 B.U.L. Rev. 13, 20.

The practical reality of this case is that race was considered by the Law School not to reinforce the heritage of discrimination, but to remedy its debilitating effects. The Fourteenth Amendment is designed to root out just that heritage. It is not designed to frustrate reasonable efforts, by other governmental bodies, to do the same.

An inquiry into the *limitations* of past decisions, remarkable for their apparent breadth, is therefore, in order.

B.

The Key to the Past Cases, In Which the Court Has Struck Down Racial Classifications and Presumed Them Unconstitutional, Has Been an Element of Inferior Treatment or Stigmatization of a Racial Minority by the Majority. The Sweep of Those Decisions, Therefore, Is of Limited Scope—Falling Short of the Present Case.

The racial classifications, which the Court has held unconstitutional in the past, have shared one characteristic: they were classifications used to stigmatize or accord inferior treatment to racial minorities,[10]

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[10] The term minority is used here, and throughout the rest of this brief, as a term of art. It denotes more than a mere "numerical minority." For a racial group with a numerical majority in a particular area may nonetheless be a "functional minority." It, in other words, may have the functional attributes of the most isolated and victimized minority: it may be relatively powerless, subjected to past and present discrimination by those who hold power, and set apart both physically and psychologically. That, indeed, has long been the condition of the black "minority" in America—and no less so in areas where blacks were in a numerical majority. See footnote 18 below.

long subject to racial discrimination in America. The past cases, in other words, involved discrimination *against* already-victimized racial minorities.

These racial classifications, held unconstitutional, have been of three types. Progressively, in these cases, the element of inferior treatment or stigmatization of a racial minority has been less and less obvious on the surface. But, progressively, the Court has searched out that element beneath the surface and struck down the classifications.

(1) In many of the early cases, the inferior treatment of a racial minority was explicit and clear. E.g., *Strauder* v. *West Virginia,* 100 U.S. 303 (blacks forbidden to sit on juries); *Nixon* v. *Herndon,* 273 U.S. 536 (blacks barred from voting in Democratic primaries). See *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 198-199. In many other cases, it was less explicit, but no less clear. E.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356 (law enforcement directed solely against Chinese minority); *Guinn* v. *United States,* 238 U.S. 347 (literacy test for voting effectively applied only against blacks through a "grandfather clause"). The Court held that such inferior treatment of a racial minority was unconstitutional not only in itself, but also because it imposed a "brand upon them . . . an assertion of their inferiority." *Strauder* v. *West Virginia,* 100 U.S. 303, 308. See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374.

The Court's earliest statement that racial classifications are "suspect" and subject to "rigid scrutiny" was worded generally, but came in a case of this kind: one that involved the most blatantly inferior treatment and stigmatization of a racial minority. *Korematsu* v. *United States,* 323 U.S. 214.

(2) State action designed to keep the races apart —to segregate them—was, for almost sixty years, left largely undisturbed on the ground that "separate but equal" treatment did not constitute inferior treatment of the racial minority.[11] E.g., *Plessy* v. *Ferguson,* 163 U.S. 537. But in *Brown* v. *Board of Education,* 347 U.S. 483, the Court brought segregated treatment within the ban on inferior treatment. It did so explicitly on the ground that segregated treatment *is* inferior treatment, and therefore unconstitutional. "Separate educational facilities," it said, "are inherently unequal." *Id.* at 495. And, again following the theory of the previous inferior treatment cases, it said: "To separate [black school children] . . . solely because of their race generates a feeling of inferiority as to their status in the community . . . [T]he policy of separating the races is usually interpreted as denoting the inferiority of the Negro group." *Id.* at 494.

It was in a case of this second sort that the Court next re-affirmed its earlier statement that racial classifications are "suspect" and subject to strict scrutiny. *Bolling* v. *Sharp,* 347 U.S. 497, 498. Again, this statement was worded generally. But, again, it came in a narrower context: *Bolling* was the companion case to *Brown,* concerning school segregation in Washington, D.C., and plainly involving the same elements of inferior treatment and stigmatization of the black minority.

(3) Finally, the Court has struck down racial classifications that involved inferior treatment or

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[11] But see *Buchanan* v. *Warley,* 245 U.S. 50 (striking down, under the due process clause, a zoning ordinance providing for the racial segregation of neighborhoods).

stigmatization of a racial minority that was neither patent on the surface nor accomplished through segregation. In these cases, the Court has at first struck down the classifications without reference to inferior treatment or stigmatization, and then later pointed out these subterranean, but essential, elements.

An early example was *Anderson* v. *Martin,* 375 U.S. 399. It dealt with a State statute requiring that a candidate's race, whether black or white, be printed by his name on the election ballot. The Court held the statute unconstitutional, stating generally that the state had no right to "encourage its voters to discriminate upon the grounds of race." *Id.* at 402. But, at one point in the opinion, it noted that the evil of the statute was that it specifically encouraged the racial majority in an election district to discriminate against the racial minority. *Id.*

The Court, in later cases of this type, has explicitly rationalized and followed *Anderson* as a case involving the encouragement of inferior treatment of a racial minority. In one instance, concerning a charter provision that required any fair housing ordinance to be approved by referendum, the Court held the provision unconstitutional and observed:

> "[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, *Anderson* v. *Martin,* . . . [the law here] places special burdens on racial minorities . . . "

Hunter v. *Erickson,* 393 U.S. 385, 391. Thus, once again, the basis of the Court's decision—the inferior treatment or stigmatization of a racial minority—was clear. [12]

It was in cases of this kind that the Court first stated that racial classifications must be shown to be "necessary" to achieve an "overriding purpose." The first, *McLaughlin* v. *Florida,* 379 U.S. 184, concerned a statute forbidding inter-racial co-habitation. Its sequel, *Loving* v. *Virginia,* 388 U.S. 1, involved a law forbidding miscegenation. The co-habitation law was explained by the State as essential to enforcement of its miscegenation law; it did not patently involve inferior treatment of a racial minority as such, and it did not involve the inferior-treatment-through-segregation struck down in *Brown.* The *McLaughlin* Court held the law unconstitutional as "unnecessary" to achieve the proffered purpose, but it said nothing to identify the crucial element of stigmatization. Only when the Court struck down the anti-miscegenation law, in *Loving,* did it point to that element. For it then condemned such laws as "measures designed to maintain White Supremacy." 388 U.S. at 11.

A review of the Court's racial classification decisions, then, yields one conclusion: the sweeping doctrinal statements of hostility to "racial classifica-

[12] Significantly, in cases where the inferior treatment of a racial minority has not been shown, the Court has upheld State action challenged as discriminatory. Thus it upheld a requirement that all publicly financed low-cost housing projects be approved by referendum. It observed that the housing affected would not solely "be occupied by a racial minority," and it concluded that "the record [does not] . . . support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority." *James* v. *Valtierra,* 402 U.S. 137, 141.

tions," putting them in a separate category under the Equal Protection Clause, have been crafted to deal only with classifications used to subject a racial minority to inferior treatment or stigmatization.

These doctrines, therefore, have no application to the present case. The University of Washington policy does not accord inferior treatment to racial minorities; rather, it is challenged as according them superior treatment. Nor does the University policy stigmatize the minorities.

There is some suggestion in an *amicus* brief submitted to this Court that the allegedly favored treatment given minority students might be regarded by some of them as "paternalistic" and thus stigmatizing. Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* in Support of Jurisdictional Statement, at 12. But there is absolutely nothing in the record to support such a conclusion; the *Amicus* admits that the "record is silent." *Id.* In fact, the record does not even hint at a basis for such a conclusion.[13]

The major premise of the University policy was that racial minorities were as deserving as anyone else of a good education and opportunity to assume important social roles in adult life.[14] That hardly amounts to a brand of inferiority. A minor premise of the University policy was that the minority students admitted, some with lower grades and scores but with motivation

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[13] Does the *amicus* seriously suggest that minority students would *prefer* to remain *excluded* from law school? The civil rights organizations, joining this brief, consider this "paternalism" argument to be itself highly patronizing and divorced from reality.

[14] St. 222-225

and abilities not embodied in numerical labels, could "move out of the University at the same level or degree that all other students do."[15] That hardly amounts to a brand of inferiority. To be sure, University officials felt privately that certain minority students may present more of a "risk" than others.[16] But they thought it was a risk worth taking, they saw a potential in those students for success in law school, a potential which others might have denied out of hand. That, again, hardly amounts to a brand of inferiority.

The assertion that the University's policy was "paternalistic" and 'stigmatizing" toward racial minorities is part of an effort to bring this case within the ambit of the past racial classification cases. But it is an effort that must fail so long as courts are able to tell actions that brand minorities as inferior from actions that deny such inferiority.

Because the element of inferior treatment or stigmatization of a racial minority, central to past holdings, is not present here, those holdings cannot be used to shift the presumption against the constitutionality of the racial classification in this case. But it remains to inquire *why* classifications should be presumed unconstitutional only if they so burden a minority group.

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[15] St. 242.

[16] St. 234, 418, 423.

C.

The Theory of "Suspectness," That Shifts the Presumption Against the Constitutionality of a Classification, Applies Only to Classifications Used To Burden "Insular" and Victimized Minorities. Thus the Classification in the Present Case, Not So Used, Should Not Be Presumed Unconstitutional.

Stepping back from past decisions on racial classification to the criteria for "suspectness" of classifications generally, the basis and limits of "strict" review under the Equal Protection Clause become clear.

Lists of the classifications that have been held "suspect," and presumed unconstitutional, often describe them in categorical terms. One list includes classifications "based on race" and "those based on national origin, alienage, indigency, or illegitimacy."[17] The description conveys the impression—shown above to be incorrect—that *all* racial classifications have been held "suspect," or that *all* classifications based on national origin, alienage, indigency or illegitimacy have been presumed unconstitutional.

In fact, the "suspectness" of a classification does not depend "per se" on the broad characteristic, such as race or alienage, used to distinguish people. Rather, it depends more narrowly on what group is disadvantaged by the classifications in question. A classification is "suspect" only if it is used to disadvantage "insular" and victimized minorities.

Last Term, the Court made this point and defined the criteria for "suspectness" quite plainly. In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, it set

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[17] *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 61 (Stewart, J., concurring).

out to determine whether the groups disadvantaged by a Texas school financing scheme were subjected to a "suspect" classification. It held that they were not. For, the Court said, the alleged discrimination had "none of the *traditional indicia of suspectness:* the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28 (emphasis added).

Why is a classification "suspect" only if it disadvantages a group subject to a history of discrimination or held down by special disabilities or political powerlessness? The answer lies in the history of the Fourteenth Amendment and in the American doctrine of judicial review.

First, there is no dispute that the central purpose of the framers of the Fourteenth Amendment was to give special protection to one particular group long subject to discrimination and every form of disability: blacks. As Professor Bickel has written: "Everyone's immediate preoccupation in the 39th Congress . . . was, of course, with the hardships being visited on the colored race." Bickel, *The Original Understanding and the Segregation Decision,* 69 Harv. L. Rev. 1, 60. For many years, this Court stated that special protection for blacks was the *only* purpose of the Equal Protection Clause. E.g., *Slaughter-House Cases,* 83 US. 36, 81; *Strauder* v. *West Virginia,* 100 U.S. 303, 306-307. Later, other purposes and applications were recognized; but special protection for the original disadvantaged minority remained the "central" purpose. Gradually, protection was extended to other victimized

groups in positions analogous to that of blacks. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374; *Oyama* v. *California,* 332 U.S. 633, 644-646. And discrimination against these groups was eventually treated as "suspect," because most clearly at odds with the main purpose of the Equal Protection Clause.

Thus when four Justices of this Court argued, last Term, that sex-based classifications are "suspect," their reasoning for the most part applied only to those sex-based classifications discriminating *against* women. The Justices clearly perceived the analogy to blacks as the historic basis of "suspectness." "[T]he position of women in our society was," they said, "in many respects comparable to that of blacks under the pre-Civil War slave codes." *Frontiero* v. *Richardson,* 411 U.S. 677, 685. They spoke of the Nation's "long and unfortunate history of sex discrimination . . . [that] put women, not on a pedestal, but in a cage." *Id.* And they emphasized that even today "women still face pervasive discrimination in our educational institutions, in the job market, and perhaps most conspicuously in the political arena." *Id.* at 685-686.

Second, a classification is "suspect" only if used to disadvantage a minority group,[18] saddled with a history of discrimination and special disabilities, because of our democratic doctrine of judicial review. Under this doctrine, courts generally presume the acts of other,

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[18] The four Justices arguing last Term that discrimination against women should be "suspect" recognized that women are not a numerical minority. They reasoned that, *functionally,* women are the equivalent of a relatively powerless minority group: "in part because of past discrimination, women are vastly under-represented in this Nation's decisionmaking councils." *Frontiero* v. *Richardson,* 411 U.S. 677, 686 n.17.

popularly controlled, bodies to be constitutional. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 Harv. L. Rev. 129. They do so because most groups, complaining of alleged discrimination, have ample access to the responsible governmental bodies and ample opportunity to defend themselves through the normal political processes. Yet that is not the case for "discrete and insular minorities"—particularly for minorities held down by disabilities resulting from a history of discrimination. When *they* are subjected to inferior treatment or stigmatization, it cannot be assumed that "the operation of those political processes ordinarily to be relied upon to protect minorities" provides an effective alternative to judicial review. Therefore, there is a "narrower scope for operation of the presumption of constitutionality." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4.

Thus when the Court was asked to determine if classifications based on alienage were "suspect" and to be presumed unconstitutional, the Court did not hold that such classifications are "suspect" *per se.* Rather, it held that alienage classifications *that disadvantage aliens* are "suspect." It reasoned that aliens—like blacks—are entitled to special protection, because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 403 U.S. 365, 372.

Conversely, when the Court was urged to apply the "strict" standard of review to a classification based on a particular age requirement, the Court refused to do so, with one opinion noting that the "establishment of an age qualification is not state action aimed at any

discrete and insular minority." *Oregon* v. *Mitchell*, 400 U.S. 112, 295 n.14.

In the present case, the groups that are allegedly disadvantaged by the challenged classification are *non*-minority groups. They are groups *not* subject to past discrimination, *not* saddled with disabilities, and *not* politically powerless. Special protection by the courts for them would hardly be within the central purpose of the Equal Protection Clause. Moreover, the American doctrine of judicial review assumes that they have ample opportunity to seek a change in the University policy through the legislative process—and, in Washington, the popularly elected legislature *would* have power to change that policy.[19] The Court, therefore, should leave intact the normal presumption that the policy is constitutional.

That the University policy, and similar racial classifications, are not to be presumed unconstitutional does *not* mean that they are automatically permissible. This Court no longer takes such a two-dimensional approach to the Equal Protection Clause. While, at one time, it seemed that "suspect" classifications were automatically invalid, and all others automatically valid, that time is over. The Court has given "bite" to the so-called "lenient" standard of review. See, e.g., *James* v. *Strange*, 407 U.S. 128; *Jackson* v. *Indiana*, 406 U.S. 715; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1. Thus non-"sus-

[19]Washington law provides: "Except as the legislature shall otherwise specifically direct, the board of regents and the board of trustees for the state universities and state colleges shall determine entrance requirements for their respective institutions of higher education." Wash. Code, 28B, 10.050.

pect" racial classifications that are unfair or irrelevant to a legitimate purpose will be subject to careful constitutional testing, without being presumed unconstitutional.

A holding that the University policy here is not "suspect," therefore, will not open any floodgates. It will simply draw a judicious line based on judicial restraint and strict construction of the Fourteenth Amendment —a line recognizing that there are limits to the extraordinary exercise of judicial intervention under the Equal Protection Clause, and that those limits are determined by the Clause's "central meaning."

D.

Racial Classifications Are Often Unfair and Irrelevant to Any Legitimate Purpose. But They Are Not Always So. Specifically, This Court Has Held That Racial Classifications Are Neither Unfair Nor Irrelevant—Nor Unconstitutional—When Used To Undo the Effects of Past Racial Discrimination.

Often, this Court has pointed out that distinguishing among people on the basis of race is usually both unfair and irrelevant. For to classify individuals by immutable characteristics—qualities they cannot change—violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175. See *Cassell* v. *Texas* 399 U.S. 282, 286. "[R]acial discriminations," the Court has said, "are in most circumstances irrelevant and therefore prohibited." *Hirabayashi* v. *United States*, 320 U.S. 81, 100. See *McLaughlin* v. *Florida*, 379 U.S. 184, 392; *id.* at 198 (Stewart, J., concurring). For those reasons, race-based classifications will very often be unconstitutional, even under a less

"strict" standard of review. But what is very often true is not always true.

The fact that a classification is very often unfair and very often irrelevant, taken alone, does not justify the drastic step of presuming it *always* unconstitutional. Nor does it mean that the classification will always be found unconstitutional under a less automatic test. There will still be cases in which the classification is neither unfair nor irrelevant; and it is the business of the courts to keep an open mind should such cases arise.

This Court has done so. Where no burden of inferior treatment or stigmatization is imposed on a racial minority, the Court has not employed "strict" review. And, where the classification has seemed both fair and well suited to a legitimate purpose, the Court has left it undisturbed. See, e.g., *Tancil* v. *Woolls*, 379 U.S. 19.[20]

Recently, the Court has held that racial classifications are permissible in one broad and important circumstance: when they are used to remedy the present effects of past racial discrimination. Cf. *Louisiana* v. *United States*, 380 U.S. 145, 154.

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[20] In *Tancil*, the Court affirmed a District Court holding that allowed a State to require every divorce decree to be labelled with the race of the parties. *Tancil* v. *Woolls*, 379 U.S. 19, *affirming* 230 F.Supp. 156. This recording requirement was found to be solely for "statistical" purposes. It probably could not have stood up against "strict" review, for a "statistical" purpose is hardly "overriding" or "compelling" in the usual sense. But "strict" review was not applied. The requirement was permissible because it imposed no burden of inferior treatment or stigmatization on any racial minority, and it did not seem either unfair or irrelevant to the State's statistical interest. See *McLaughlin* v. *Florida*, 379 U.S. 184, 198 (Stewart, J., concurring).

Two major decisions have concerned racial classifications used as a remedy for past racial segregation that had been held unconstitutional. Thus the Court upheld a District Court order requiring that public school teachers, once segregated, be reassigned on the basis of race so as to achieve a minimum ratio of white-to-black teachers in every school. *United States* v. *Montgomery County Board of Education,* 395 U.S. 225. The Court did not treat this racial classification as "suspect" or apply "strict" review. Rather, it approved the classification, emphasizing the District Court's discretion, and noting only that the prescribed racial ratio should not be a rigid one. Later, the Court upheld an order designed to remedy past segregation of public school students by requiring that they be reassigned on the basis of race so as to achieve a satisfactory ratio of white-to-black students in every school. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1. Again, the Court did not treat the racial classification as "suspect" or subject it to "strict" review. Instead, it approved the classification, again emphasizing the District Court's broad discretion, and saying that the use of racial ratios was a proper "starting" point in the process of shaping a "remedy" for past school segregation. *Id.* at 25.

These decisions establish three principles that support the constitutionality of the University of Washington policy at issue in the present case.

First, they establish that a racial classification used to undo the effects of past discrimination is not to be presumed unconstitutional. For it does not burden—rather, it relieves the burdens of—a racial minority.

Second, they establish that such a classification is not unfair, even though based on the immutable trait

of race. For the wrong to be remedied—racial discrimination—itself defined the injured class by that trait.

Third, these decisions establish that such a racial classification is not irrelevant. What could be *more* relevant to undo the effects of discrimination against a racial group than a remedy directed to that same group?

This Court's approval of remedial racial classifications, then, is based on a principle of realism. One might hope that the work of the Fourteenth Amendment could be done simply by forbidding discrimination. But the Court has recognized that, in the real world, the scars of past discrimination have gone too deep; and racially "neutral" remedies for discrimination are too often ineffective. See *Green* v. *County School Board,* 391 U.S. 430; *Monroe* v. *Board of Commissioners,* 391 U.S. 450. Lower courts have come to understand and adopt this policy of realism. Colorblindness "has come to represent a long-term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term." *Associated General Contractors of Massachusetts* v. *Altshuler,* 42 U.S.L.W. 2320 (CA 1). For now, the Constitution must be "color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Board of Education,* 372 F.2d 836, 876 (CA 5).

E.

The Use of Racial Classifications To Remedy the Effects of Past Discrimination Is Permissible Not Only as a Coercive Remedy of Federal Courts, or the Federal Congress or the Federal Executive. It Is Also Permissible as a Voluntary Remedy Adopted by State Governmental Bodies—Including State Universities.

The principles enunciated by this Court in the *Montgomery County* and *Swann* decisions have proved fertile. In those two cases, the use of racial classifications to remedy the effects of past discrimination was (1) by a court order, (2) after a judicial finding of past *de jure* discrimination, (3) that was held to be unconstitutional. But other governmental bodies— the federal courts, the Congress, the federal Executive, local school authorities and, in this case, a State University—now are using the same remedial tool in other fashions and in other contexts. Consistently, the constitutionality of their efforts has been upheld.

The major federal uses of remedial racial classifications, that have been tested constitutionally, are under Title VII of the Civil Rights Act of 1964,[21] guaranteeing equality of employment opportunity, and under Executive Order 11246,[22] requiring federal contractors to take "affirmative action" to recruit and employ racial minorities. Pursuant to Title VII, courts have held that it is constitutional to order hiring of workers on a racial-ratio basis. E.g., *Heat and Frost Workers, Local 53* v. *Vogler,* 407 F.2d 1047 (CA 5); *United States* v. *Sheet Metal Workers International Ass'n, Local No. 36,* 416 F.2d 123 (CA 8); *United States* v. *Iron Workers Local 86,* 443 F.3d 544 (CA 3), *cert.*

[21] 42 U.S.C. 2000(e).

[22] 30 F.R. 12319, as amended, 32 F.R. 14303; 34 F.R. 12985.

denied, 404 U.S. 984; *United States* v. *Wood, Wire, and Metal Lathers Internatoinal Union, Local No. 46,* 471 F.2d 408 (CA 2), *cert. denied,* 41 U.S.L.W. 3645; *United States* v. *Local Union No. 212, Int'l Brotherhood of Electrical Workers,* 472 F.2d 634 (CA 6); *Stamps* v. *Detroit Edison Co.,* 42 U.S.L.W. 2200 (E.D. Mich.). Pursuant to Executive Order 11246, courts have held that it is constitutional to require "affirmative action" in the form of specific percentage goals and timetables for hiring of racial minorities. E.g., *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159 (CA 3), *cert. denied,* 404 U.S. 854; *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (CA 7); *Joyce* v. *McCrane,* 320 F.Supp. 1284 (D.N.J.); *Weiner* v. *Cuyahoga Community College District,* 19 Ohio St.2d 35, 249 N.E.2d 907, 908. Moreover, courts have upheld the constitutionality of orders, under the Fourteenth Amendment itself, requiring State or local governmental bodies to use a form of racial preference in hiring. *Carter* v. *Gallagher,* 452 F.2d 315 (CA 8), *cert. denied,* 406 U.S. 950; *Castro* v. *Beecher,* 459 F.2d 725 (CA 1); *NAACP* v. *Allen,* 340 F.Supp. 703 (N.D. Ala.); *Officers for Justice* v. *Civil Service Comm. of San Francisco,* 42 U.S.L.W. 2308 (D.N. Cal.).

These federal uses of remedial racial classifications, unanimously held constitutional, follow the principles announced in *Montgomery County* and *Swann;* but they have taken substantially different forms. (1) The racial ratios ordered for hiring under Title VII and the Fourteenth Amendment have been initially framed by a court, as in *Montgomery County* and *Swann.* The race-based "goals and timetables" under Executive Order 11246, however, have been initially framed by

Executive officials. (2) Like the racial classifications in *Montgomery County* and *Swann,* the ratios under Title VII and the Fourteenth Amendment have been ordered after a judicial inquiry into past hiring practices by the specific company, union or governmental body in question. But it has been held that this specific inquiry need not turn up past, purposeful discrimination by the employer or union; a mere showing of imbalance between the numbers of racial minorities available for work and the numbers hired in the past establishes a "prima facie" basis for a remedial order. See *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 551; *Castro* v. *Beecher,* 459 F.2d 725, 735. And the general requirement of "goals and timetables" under the Executive Order is applicable to *all* federal contractors, without any specific finding of their own past discrimination. (3) Finally, unlike *Montgomery County* and *Swann,* the racial classifications under Title VII and the Executive Order are ordered without any holding that the company or union in question has committed any *unconstitutional* act in the past.

These uses of remedial racial classifications by the federal government—allowed such breadth and flexibility by the courts—have, however, shared one overriding characteristic with the classifications upheld in *Montgomery County* and *Swann:* they have been coercive, extending federal power into the states. At issue in this case, on the other hand, is whether a State governmental body may *voluntarily* adopt a similar remedial policy. The question almost answers itself. In our federal system, State and local agencies must be allowed at least as much, and probably more, leeway to fashion their own remedies for the lingering disease of racial discrimination and its aftereffects. See *Younger* v. *Harris,* 401 U.S. 37.

In fact, this Court has already indicated very clearly that State and local bodies *do* have a broad and flexible power to seek equal opportunity through the use of remedial racial classifications. The Court has said that this power is much broader and more flexible than that of courts acting alone, as in *Montgomery County* and *Swann*. The Court spoke particularly of school authorities' voluntary efforts to undo *de facto* school segregation, but its comments apply more broadly:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude . . . that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary power of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of a federal court."

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16.

In this statement, the Court resolved three questions that arise in the present case. (1) State or local school authorities may act alone to use racial classifications designed to bring the races together. No court order is necessary. (2) State or local school authorities may act without any prior finding, judicial or otherwise, that they, specifically, have purposefully discriminated in the past. It is enough if they are acting to correct a mere racial imbalance. (3) And, finally, the condition they are seeking to cure through use of a remedial racial classification need *not* itself be unconstitutional.

The Court's resolution of these questions is consistent with decisions by every court to face the issue that State and local school officials are permitted by the Constitution to act on their own, using remedial racial classifications, to undo *de facto* school segregation. E.g., *Offermann* v. *Nitkowski*, 378 F.2d 22 (CA 2); *Wanner* v. *County School Board*, 357 F.2d 452 (CA 4); *Springfield School Committee* v. *Barksdale*, 348 F.2d 261 (CA 1); *Fuller* v. *Volk*, 250 F.Supp. 81 (D.N.J.); *Tometz* v. *Board of Education*, 39 Ill.2d 593, 237 N.E.2d 498; *Morean* v. *Board of Education*, 42 N.J. 237, 200 A.2d 97; *Addabbo* v. *Donovan*, 16 N.Y.2d 619, 209 N.E.2d 112. It is also consistent with court decisions upholding the constitutional power of a State government, *Associated General Contractors of Massachusetts* v. *Altshuler*, 42 U.S.L.W. 2320, and of local school authorities, *Porcelli* v. *Titus*, 431 F.2d 1254 (CA 3); but cf. *Anderson* v. *San Francisco Unified School District*, 357 F.Supp. 248 (N.D.Cal.), to undo past racial imbalance in employment by mandating racial hiring ratios.

Clearly, then, the Court has given high priority to the value of State and local freedom to use remedial racial classifications, when their purpose is to achieve equal opportunity for long-suppressed racial minorities. Its emphasis on the "discretionary powers" of these authorities to "formulate and implement" their own "educational policy" in this area goes far to support the "educational policy" of the University of Washington in the present case.

F.

It Now Being Clear That Remedial Racial Classifications Are Not To Be Presumed Unconstitutional, That Indeed They Are Broadly Permissible, and That Their Voluntary Use Is Not Confined Within Inflexible Bounds, the Racial Classification in the Present Case Should Be Permitted, Unless Shown To Be "Unreasonable" in Initiation or Scope.

What are the boundaries of the "discretionary powers" of school authorities—here, a State University—to "formulate and implement" their "educational policy" through use of a remedial racial classification? Because it is the exercise of "discretionary powers" that is involved, and because remedial racial classifications are not presumed unconstitutional, a "strict" requirement of "necessity" and "compelling" justification would be inappropriate.[23] But, because

[23] This is not to suggest that the Law School's admissions process could not pass such "strict" scrutiny. To the contrary, it seems clear—given the purpose of the Fourteenth Amendment—that efforts to remedy past discrimination and to bring the races together are in service of a "compelling interest." What could be a more "compelling" purpose, under the Amendment, than to set out to achieve exactly what the Amendment itself was meant to achieve?

There is, moreover, no "less onerous alternative" to the Law School's minority policy. An effort to seek only "disadvantaged" minority students, rather than minority students generally, would be impossible to administer and would not solve the problem of exclusion of all minority students, "disadvantaged" and non-"disadvantaged" alike, from the School in the past. See pages 59-60 below. Mere reliance on "compensatory education" programs at the primary and secondary school levels to solve the problem would be even more inadequate. Such "compensatory education" programs are useful, but they are not yet anywhere near perfect; by themselves, they cannot heal the scars left by discrimination on the present generation of minority children; and, in any event, they offer nothing at all to those minority youths who have already graduated from secondary school without such help.

there are inherent dangers of excess in the use of any racial classification, the usual test of mere "rationality" may be too weak.

A test for a voluntary, remedial racial classification should be designed to deal with the danger of excess. A remedial classification, used to deal reasonably with a real problem in a moderated fashion, presents little danger. But a classification used for no reason or hardened into a rigid "quota," could needlessly prejudice the opportunities of non-minorities.

A proper test will be both flexible enough to honor the right of school authorities to adapt a remedial policy to their own perception of a particular problem, yet not so flexible as to allow establishment of a "reverse racism." The basis for such a test is familiar to every court: it is the test of reasonableness. Remedial racial classifications—including that of the University of Washington Law School—should be permitted unless shown to be unreasonable in initiation or scope.

II. APPLICATION OF THE LAW: THE REASONABLENESS OF THE LAW SCHOOL'S ADMISSIONS PROCESS

A.

The University of Washington's Decision To Initiate a Policy of Seeking More Than a Token Number of Minority Students Was Not Unreasonable.

The reasonableness of the University's decision to seek more minority students may be tested in three separate respects: Was the decision based on a reasonable perception of a real problem to be remedied? Was the policy reasonably designed to remedy it? Was the University's decision within reasonable limits of the

broad "educational policy" that a University is entitled to choose for itself?

The immediate problem that the University's policy was designed to solve was the mere token presence of minority students on its campus. The University President, Charles Odegaard, testified that he initiated a study of this question after he saw "so few" black students graduating from the University at its 1963 Commencement exercises. (St. 222-223.) The study, by a faculty committee, was hardly precipitate. It lasted almost two years. In 1965, it resulted in a formal report focusing on the very small numbers of minority students at the University and recommending the sort of affirmative policy that was later adopted to seek more minority students. (St. 223-227.) When the University Law School applied this policy to its admission process, it, too, focused on applicants from minority groups that had sent no more than a few students to the School in the past. (St. 352.)

The University policy, however, was not designed only to deal with this immediate problem. University authorities saw the near-absence of minority students on their campus as part of a broader problem. President Odegaard defined it as the need of minority groups to "acquire the kind of educational background required for many of the roles in society." (St. 223.) The Law School Dean, Richard Roddis, saw the need for a "policy of paramount social importance on a national and state level to rapidly increase the participation and representation of people from these [minority] groups in the [legal] profession." (St. 419.)

There is nothing, in the record in this case or outside it, to suggest that the University's perception of these problems was not reasonable—or that the policy it adopted, affirmatively to seek more minority students, was not reasonably designed to remedy them.

At trial, the Petitioner did not even attempt to contest the University faculty committee's finding that no more than a few minority students were being admitted under the old admissions system. Certainly, that finding, as applied to the Law School, is entirely consistent with contemporary national findings. In 1965, the year this University's committee issued its report, the American Association of Law Schools also issued a report on the same problem, though confined to one minority: blacks. It found that there were only about 700 blacks in America's 150 law schools. About half of them were in 5 largely black law schools. Thus blacks represented only about 1.3% of all law students, and less than 1% in the non-black schools. 1 *1965 Proc. AALS* 172.

The Petitioner also did not attempt to challenge the University's perception of the broader problem it meant to remedy—the extreme scarcity of racial minorities in important professions, and particularly the legal profession. Since the time of Alexis de'Toqueville, the extraordinary importance of lawyers in America has been universally recognized.[24] Yet studies conducted during the 1960's found that "[w]hereas about one American in 625 becomes a lawyer, only one in 7,100 Negroes choose the law . . . Negroes constitute 12% of the nation's population, yet comprise less than one

[24] 1. A. deTouqueville, *Democracy in America* 282-290 (Vintage ed.)

percent of the legal profession." [25] Available statistics indicate that other minority groups, such as Indians and Chicanos, have even fewer of their own in the legal profession.[26] And, while figures for the State of Washington are harder to come by, it is known that, as of 1970, the State had only 20 black lawyers. 116 Cong.

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[25] Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073. In the greatest American cities, the mere token representation of blacks in the legal profession is astounding. Hearings on white collar employment, held in New York City by the Equal Employment Opportunity Commission in 1968, for example, revealed that of the 26 major industry groups in the city, law firms ranked next to last in black participation. Seven percent of white collar workers employed by banks were black; only 1.4% of those employed by law firms were black. In 1967, the 30 largest New York City firms employed three black attorneys among them. Among Chicago's seven largest firms, only one black attorney was employed in 1967, while the ten largest Washington, D.C. firms and the two largest Boston firms employed no black attorneys. Brown, *Racial Discrimination in the Legal Profession*, 53 J. of Am. Jud. Soc. 385.

A 1971 survey of 44 Midwestern law firms showed that only .08% of the firms' partners and only 1.2% of their associates were black. Edwards, *A New Role for the Black Law Graduate*, 2 Black L.J. 21, 34, 38, 40.

[26] A State with one of the largest Spanish-American populations is California. Spanish-Americans make up 11% of Californians; but less than 1% of California's lawyers are Spanish-American. California State Department of Finance, Provisional Estimate of Racial and Ethnic Composition of California, July 1966 & July 1967; Northern California Legal Director (1968); Southern California Legal Directory (1968).

A city with a large Chicano population—9% of total population—is Denver. Yet only .05% of the city's attorneys are classified as Chicano. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U.Tol.L.Rev. 281.

Arizona, New Mexico and Utah have almost 135,000 American Indian residents. But, as of 1968, there was not even one Indian practicing law in the first two of these states. University of New Mexico, *Special Scholarship Program for American Indians* (Brochure), at 4.

Rec.E. 7996 (daily ed., Sept. 2, 1970). One estimate is that there now is one white lawyer for every 720 whites in the State; but there is only one black lawyer for every 4,195 blacks, one Indian lawyer for every 6,677 Indians, and at most one Mexican-American lawyer for every 35,367 Mexican-Americans.[27]

Just as the Petitioner has not challenged the reasonableness of the University's perception of the problems it sought to remedy, so he also has not suggested that the "discretionary" policy it adopted to seek more minority students was not reasonably adapted to the purpose. Plainly, if there are very few minority students admitted to law school and graduating into the legal profession under an admissions system that emphasizes one set of factors, a more "discretionary" policy looking also to other indications of individual potential of minority applicants is well designed to remedy the problem.

During the same period in the late 1960's that the University of Washington was initiating such a policy, "many, possibly a majority" of other law schools took the same step.[28] Moreover, several "sponsoring organizations"—including the American Bar Association and the Association of American Law Schools—joined, on a national level, to form the Council on Legal Education Opportunity at about the same time. (St. 121-122.) The Council sought to aid law schools, in their

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[27] Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 Wash.L.Rev. 1, 38.

[28] Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U.Tol.L.Rev. 321, 326 n.11.

"discretionary" efforts to identify minority applicants with special potential, by establishing six-week summer institutes for such applicants and then giving special scholarship support to "those who successfully complete the summer institute and who do then choose to go on to law school." (St. 123-124.) Thus the University of Washington was far from the only institution in America to decide that affirmative efforts were needed if it was to bring minorities into the legal profession through the law school admissions process.

Certainly, such a decision was well within reasonable bounds of the Law School's "broad discretionary power" to determine its own "educational policy." A law school's educational concerns have never been confined—and, clearly, the Constitution does not confine them—to a narrow focus on teaching and testing. As this Court recognized long ago, a "law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt* v. *Painter*, 339 U.S. 629, 634. Thus, even in a narrow educational sense, a law school has an important interest in the variety of its student body. The University of Washington acted in this interest, out of concern for its "educational environment." (St. 418.) Such action is entirely common, as President Odegaard testified:

> "It is a very common thing in higher education . . . for universities to regard a mix of students from many areas as preferable to a parochial group, and this is a very common policy throughout the nation. . . . Students obviously learn from students, as well as from their immediate instructors, and this, therefore, enriches their own educational opportunity."

(St. 218.)

Moreover, the boundaries of a law school's "broad discretionary power" over its "educational policy" extend beyond the immediate educational environment to the contribution it is making to society, through its graduates. A law school, particularly, cannot ignore the fact that its admissions decisions, as well as the type of education that it provides, will have an impact on the country. Only an irresponsible school would not take this fact into account; the University did take it into account.

On this record, then, the reasonableness of the University's decision to initiate its minority policy has not been shaken. Indeed, only one theory has been suggested—by an *Amicus* supporting the Petitioner's position—to attack that decision. The suggestion is that school authorities should be allowed to adopt a remedial policy toward racial minorities only if they have themselves engaged in "prior discrimination" against such minorities, or if their remedial policy "deprives" no one else of opportunities previously enjoyed. Brief of Anti-Defamation League of B'nai B'rith as *Amicus Curiae* in Support of Jurisdictional Statement, at 16.

This proposed limit on the voluntary action of State and local authorities has no basis in the law. Indeed, the law has already gone well beyond such rigid constraints.

First, there is no requirement that a State or local body taking remedial racial action must do so without "depriving" anyone else of accustomed opportunities. Our heritage of racial discrimination has not only harmed minorities; it has also benefitted certain other groups. A remedy for the harm will often inevitably

reduce some of the accustomed benefits. Even the racial ratios approved for school assignment in the *Montgomery County* and *Swann* decisions had this effect. The mandatory assignment ratios "deprived" whites of certain benefits, forcing them to leave schools that they liked, often closer to home. Blacks sought the re-assignments; they preferred to go to other schools. Whites preferred to stay where they were; yet they were moved. School re-assignment by school boards to remedy *de facto* segregation has the same "deprivation" effect on whites. No doubt, many of the white teachers and students who are re-assigned have not committed any discriminatory act. But, in the real world, there often is no way to remedy a long-established discriminatory system of distributing benefits and burdens without "depriving" someone of some benefits at least on a short term basis.[29] Neither this Court nor any court has let this fact of life stop remedial efforts.

Second, there is no requirement that a State or local body using a remedial racial classification show that it, specifically, has discriminated against minorities in the past. The countless court decisions unanimously upholding the authority of local school boards to undo past *de facto* school segregation have made this clear. See cases cited on page 45 above. *De Facto* school segregation, by definition, need not be the result of specific discrimination by the school board. Rather, it is the result of discrimination by others—for example, in

---

[29] It should be noted that the Petitioner, DeFunis was *not* "deprived" of a legal education. DeFunis was denied the opportunity to study law at one particular University; but, for two years in a row, he was offered admission to other law schools, both in his home State and outside it.

the sale or rental of housing—and of the myriad debilitating effects of such discrimination that reinforce segregated housing and therefore school enrollment patterns. This Court has itself stated clearly that school boards are entitled to use remedial racial classifications to undo such *de facto* segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16.

The remedial action that the University of Washington Law School voluntarily took in the present case is quite similar to voluntary action by school boards to remedy *de facto* school segregation. Accordingly, it should not be subjected to more rigid limitations.

To be sure, the record in this case gives some indication that this University once engaged in specific, purposeful discrimination against minority students. President Odegaard testified that, in 1958, "there were references . . . to racial [discrimination]" at the University. (St. 221.) But, in a later exchange at trial, he mentioned no such discrimination:

> "Q—There never was a policy to keep minority students out [of] there, at any time?
> A—[by President Odegaard] There was no policy to keep students out. It was a form of operation at the University that obviously, some way or another, detracted from the minorities that came."

(St. 240-241.) The problem thus was one of past *de facto* non-admittance of minority students, due to general "cultural conditions" (St. 223-224.)—i.e., due to pervasive racial discrimination in the society that limited access by minority youths to the kind of preparatory education and other opportunities that facilitated admission to the Law School.

Of course, it is easier to identify and assess the *de facto* segregation of a school district than the *de facto* exclusion of minorities from a law school or the legal profession. A school district has a given "pool" of school children; the imbalance from school to school can be quickly calculated. A law school draws its students from a much larger "pool," of vaguer dimensions. *De facto* exclusion of minority students cannot usually be calculated accurately from the percentage of minority population in any specific geographical area, if the school draws students from many areas. Nor can it be easily calculated just by looking at the number of actual applicants and their races. For social, economic, and cultural conditions, related to past discrimination, may keep many even from applying.

The University of Washington Law School has chosen to be a "national law school." (St. 405.) It draws applications from around the country; almost half of the applicants to whom it offered admission in 1971 were from out of state. (St. 216) Thus the "pool" of minority students who may have been excluded from the Law School in the past should be measured on a national scale.

Perhaps no precise measurement is possible. But this Court has recognized that racial discrimination is a national "evil . . . which in varying degrees manifests itself in every part of the country." *Oregon* v. *Mitchell,* 400 U.S. 112, 284; *id.* at 133-134, 216, 235. More specifically, the Court has recognized that discrimination in primary and secondary education may result in later disadvantage to minorities when educationally-based tests are used to condition access to a benefit. See *South Carolina* v. *Katzenbach,* 383 U.S.

301, 327-334; *Gaston County* v. *United States,* 395 U.S. 285; *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430. This effect of past discrimination, the Court has said, is not confined to any one particular area where past inequality in education has been especially burdensome; rather, it may be felt throughout the country. *Oregon* v. *Mitchell,* 411 U.S. 112, 133, 216, 235, 283. Clearly, an effect of this general kind was felt at the University of Washington Law School and resulted in the exclusion of minority students.

The difficulty in assessing the extent of such *de facto* racial exclusion from law school might possibly deter a court from holding it unconstitutional, even if *de facto* segregation of public school districts is outlawed under the Fourteenth Amendment. See *Keyes* v. *Denver School District No. 1,* 413 U.S. 189, 217 (Powell, J., concurring). But a state of affairs that might discourage judicial interference with law school admissions policy need not also prevent the law school itself from revising that policy. "[A]bsent a finding of constitutional violation," a court may not order a remedy based on racial classification; but for school authorities "[t]o do this as an educational policy is within [their] . . . broad discretionary powers." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16.

B.

The Law School's Affirmative Policy To Seek Minority Students Was Not Unreasonable in Scope.

The reasonableness in scope of the Law School's minority admissions policy may be tested in three separate aspects: Was the Law School's choice of the minorities to be covered by the policy a reasonable one? Was the departure from normal procedures in the treatment of minority applications reasonably

limited? Was the end result, in terms of minority applicants admitted, reasonably consistent with the institutional mission of the Law School and with the interests of non-minority applicants?

The first of these questions is not involved in this case. The Petitioner did not claim, at trial, to be the member of any minority group that had been subject to *de facto* exclusion from the Law School, but that was not included in the School's affirmative admissions policy toward previously excluded minorities. Nor did the Petitioner present any evidence to suggest that there is any such previously excluded group, not covered by the Law School's policy.

The record is clear, however, on the standards used by the Law School to choose the minorities covered by the policy. The School focused on two factors: past, pervasive discrimination against the minority group and past absence of any more than a few students from the minority in the Law School. Its application of these standards is illustrated in its decision not to include Asian-American applicants under the affirmative policy. Asian-Americans were long subject to discrimination in the north-western States. See, e.g., *Yick Wo* v. *Hopkins,* 118 U.S. 356. But, the Law School admissions committee found, a "significant number" of them were then being accepted through the ordinary process. Thus it concluded that their situation, at the time, was significantly different from that of blacks, Indians, Mexican-Americans and Philippine-Americans.[30] (St. 352.) Such a process for selecting the minorities to be sought was surely, on its face, a reasonable one.

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[30] We understand that, for the year 1974, Asian-Americans are being included as minorities for admissions purposes.

The Petitioner has suggested that the Law School should have singled out only minority applicants shown to be personally "disadvantaged" or "poor" or "culturally deprived." Petitioners' Opening Brief, at 10. This matter was brought up briefly at trial, when a member of the admissions committee was testifying, and it was established that the School had no information to apply these vague concepts in individual cases:

> "Q—Well, was there anything to show you that perhaps the Afro-American was—came from a very affluent family?
> A—There was no way of telling that."

(St. 262.)

Even if the School had attempted to define "disadvantage," "poverty" and "cultural deprivation," and even if it had required minority applicants to submit the extensive information needed to apply the definition, such a distinction would have been inappropriate. For it was the racial minorities generally—not just their "disadvantaged" or "poor" or "culturally deprived" members—that had suffered in the past from pervasive racial discrimination and *de facto* exclusion from the Law School and the legal profession, which were the problems the School sought to remedy. In that sense, all members of the minority groups were relevantly "disadvantaged" for the purposes of the University policy.[31]

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[31] There is, of course, no evidence whatever that the Petitioner, DeFunis, was himself disadvantaged in any way. "There is nothing in the record to show whether or not . . . DeFunis or any of the white applicants were in fact culturally disadvantaged, poor or discriminated against." Petitioners' Opening Brief, at 12.

The remedial racial classifications consistently upheld in the past have not distinguished between "poor" and "non-poor," or "culturally deprived" and "non-culturally deprived," members of racial minorities. Remedial hiring, on the basis of a racial ratio, ordered under Title VII of the 1964 Civil Rights Act has made no such distinction. See cases cited on pages 41-42 above. Nor have the "affirmative action" plans under Executive Order 11246. See cases cited on page 42 above. To be sure, the poverty or "cultural deprivation" of many members of racial minority groups has contributed to their past failure to gain admission to law schools and the legal profession and certain other kinds of employment. But these factors are too tightly connected to more than a century of racial discrimination to be easily separated out. The courts have upheld remedial racial classifications in the past because of that history, not because of sociological categories such as "poverty" or "cultural deprivation."

If the University did not act unreasonably, then, in selecting the minority groups covered by its affirmative policy, the question remains whether the policy itself was unreasonable in operation. In fact, it is the differential treatment of the minorities, not their selection, that the Petitioner is objecting to in this case.

It is true, of course, that minority applicants were not accepted or rejected solely on the basis of their college grades and L.S.A.T. scores. But neither were non-minority applicants. In the case of *every* applicant, the admissions committee looked beyond grades and scores for indications of special personal potential or motivation or background that might contribute to the law school community. In the case of *every* applicant, the committee examined the required letters of

personal recommendation and the optional personal statements submitted. See pages 15-18 above. In the case of *every* applicant—including the Petitioner—the committee, conducting a review of the files, gave special heed to evidence of personal character and experience. (St. 387.)

The "discretionary" admissions system, in other words, was applied to minority and non-minority applicant alike. The Petitioner is simply incorrect in representing that: "Of course all white students were subjected to the standardized mathematical criteria for admission." Petitioners' Opening Brief, at 16. *No* students were subjected to such "standardized" criteria.

The differential treatment accorded to minority applicants was only a matter of degree—within the "discretionary" system applied to all. The treatment was different in just two respects. First, somewhat more weight was given to non-grade-and-score factors in the applications from minority students. Second, as a matter of administration, all minority applications with a P.F.Y.A. below 77 were deferred for consideration in May, when they were first reviewed by committee members with unique knowledge of minority problems and then reviewed by the whole committee at a separate meeting.

These may seem to be stark differences in treatment, if viewed out of context. In the context of the overall "discretionary" admissions process, however, the differences blend into the background of multivarious factors considered in process, with varying weights inevitably attached to varying factors in varying cases. Many variables, if singled out and made the subject

of litigation, might seem to alter the overall process far more than they really do. For the goal of the process remained, whatever the varying weights given to different factors in different cases, the selection of a group of students qualified to study law and to contribute to both the law school community and the community at large.

Just as a school seeking football players, or musicians, or scientists, or students from different parts of the country—or sons and daughters of alumni—might look especially carefully at the applications of people with such backgrounds so the University of Washington Law School looked especially carefully at applications from minority students. Giving especially close attention to the applications of minority students, in fact, was *more* reasonable a measure than pursuing a similar policy towards football players or sons of alumni. For what set minorities apart for careful consideration was the fact that they had been largely missing in the past and that by seeking to admit more of them, the Law School could bring more heterogeneity to its "educational environment" and make a contribution to the racial problem plaguing America for decades.

Moreover, the attention given to non-grade-and-score factors for minority applicants—both in assigning such factors somewhat greater weight and in deferring all minority applications with P.F.Y.A.'s below 77 for separate consideration in May—contrasts less sharply with the attention given such factors for non-minority applicants when it is recognized that, for many minority students, pure grade-and-score factors may poorly reflect law school performance. The testimony on this point, at the trial of this case, was un-

contested. Professor Millard Ruud of the University of Texas Law School described a study that he had done for the Council of Trustees governing the Law School Aptitude Test. His study concluded that "with respect to minority groups" the L.S.A.T. was a more fallible predictor of law school achievement. Thus, he said, "there is a greater need [in their case] for exercise of judgment of looking at, examining the transcript, examining all the other data." (St. 129.) [32]

The Petitioner, in attacking the reasonableness of such subtle substantive and administrative balancing decisions by the Law School, is asking this Court to march into a bog from which it would not soon extricate itself. Even if the Court ordered all law schools everywhere to give substantially the same weight to all factors for minority and non-minority applicants, how could it ever police this principle? How could a law school be sure it was obeying the principle? Admissions committees, after all, do not use scales so precise that weights can be measured exactly. [33] Here, non-grade-and-score factors were given *some-*

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[32] There is, of course, much scholarly debate over the value of the L.S.A.T. as a predictor of law school performance. But the clear testimony of Professor Ruud stands unchallenged in this record. And, in any event, whether or not the L.S.A.T. predicts law school grades, there is no suggestion anywhere that it predicts one's performance *as a lawyer*. It is, after all, to train lawyers—not merely to grade students—that law schools exist.

[33] Moreover, it is not only the immediate balancing decisions by an admissions committee that affect the admissions process. Other factors enter in, such as the distribution of scholarship money or even the effort put out by a school to invite applications from—to recruit—certain types of students. Scholarship and recruiting decisions are no less subtle or important than immediate admissions decisions; but, presumably, the Petitioner would want this Court to impose rigid rules there as well.

what more weight for minority students. Was it too much more? How much more is too much? Surely, there is no constitutional rule that all law schools must base admissions decisions solely on college grades and L.S.A.T. scores, ignoring all indications of personal potential and motivation. Yet that is the only rule that would be at all workable if petitioner were to prevail.

In the present case, since the differential treatment was simply a matter of what weights were assigned to different factors in the decisionmaking process, the Petitioner has not succeeded in making a showing of unreasonableness. A court is well advised, in this instance, to defer to the experience of the school authorities. And, here, those authorities felt that they "already had enough experience to show that persons [from minority groups] who, on the basis of the conventional . . . aptitude tests or grades, may do rather poorly, actually, when admitted to the University . . . can and do make excellent records." (St. 234.)

It remains only to examine the reasonableness of the end result of the Law School's minority policy. If the Petitioner had shown that the School, in 1971, admitted a rigid "quota" of minority applicants or admitted actually "unqualified" minority applicants, this would be a difficult case. The School would be hard put to justify such a result as reasonably consistent with its institutional mission or with the legitimate interests of non-minority students. But the Petitioner did not make any such showing.

The most that the record reveals is that the Law School sought a "reasonable representation" of minority students—not a "quota." (St. 420.) Of course,

any affirmative policy, designed to undo the effects of past racial deprivations, must set some kind of goal for itself. In remedying racial imbalance in employment under Title VII of the 1964 Civil Rights Act, many courts have ordered specific numerical ratios for the future hiring of qualified blacks and whites. See cases cited on pages 41-42 above. The University of Washington, however, has not even set such ratios. Rather its goal of "reasonable" representation was both highly flexible and consistent with the overall "discretionary" nature of its admissions process.

Even more central to the reasonableness of the Law School's policy is the fact that it did not admit unqualified minority students at the expense of qualified non-minority students. The Dean of the Law School testified that "[w]e will go down to reach" a "reasonable" representation—i.e., "go down" in terms of taking some minority students who present a somewhat greater risk than others. But, he testified, "[w]e do not go down to the point of taking people that we think are unqualified, and that is an important point." (St. 420.)

The Petitioner did not successfully challenge this testimony. To be sure, it was shown that the admissions committee considered the applications of minority students at a separate meeting. (St. 351.) But the record is clear that the basic standard of qualification for law study applied at that meeting was the same as that applied at all the committee's other meetings. (St. 353, 399.) The Petitioner made much of the fact that some minority students admitted may have been "less" qualified than some others. (St. 245.) But, as every witness made clear, distinctions of degree above the basic standard of qualification—a reasonable likeli-

hood of success in law school—depend on subtle personal factors as well as grades and scores, and no one narrow definition of "more qualified" or "less qualified" is serviceable. (St. 73, 245, 353, 417-418, 423-424.) It can always be made to appear that, under one rigid criterion such as grades or test scores, "less qualified" applicants are admitted while "more qualified" applicants are rejected. But, when the essentially "discretionary" nature of the admissions process is recognized, distinctions blur and fall far short of invidious discrimination.

The Petitioner also made much at the trial of three specific minority students who were offered admission to the Law School in 1971. Each of the three had grades and scores substantially lower than the Petitioner's. But, as the Chairman of the admissions committee pointed out, these three individuals were all graduates of Council on Legal Education Opportunity summer institutes. (St. 397, 399.) They were called to the Law School's attention by the director of the institutes. (St. 411.) Thus the Law School had special information about their personal characteristics to weigh against their grades and scores. Whether, on the basis of that information, these three students were substantially "less qualified" for law study than others is hardly the clear-cut matter that the Petitioner seemed to suppose it was.

Naturally, the Law School's remedial racial policy had some costs for non-minority individuals. The class entering the School in 1971 included 18 minority students. While all of them were considered qualified for law study, some of them might not have been admitted if the School had concentrated less closely on their

non-grade-and-score qualifications. A few of the 1,300 other applicants, rejected in 1971, might have been admitted in their place.

By definition, any remedial policy, making adjustments in a system of distributing benefits, will somewhat improve the opportunities of those previously excluded and somewhat diminish the opportunities of those previously included in abundance. The question, always, is whether the adjustment is a reasonable one. We submit, in the present case, that it is.

CONCLUSION

What is so important about this case is not that the Petitioner is asking the Court to interfere with the discretionary admissions process of a law school. Rather it is that the Petitioner is asking the Court to cripple efforts in this country to exorcise, at long last, the effects of our heritage of racial discrimination.

The Court has long recognized that it is not enough simply to "bar . . . discrimination in the future;" it is also necessary "so far as possible [to] eliminate the discriminatory effects of the past." *Louisiana* v. *United States,* 380 U.S. 145, 154. The Court has also recognized that the chain-reaction of those discriminatory effects has gone both wide and deep. The establishment of a dual school system may affect voting opportunities. *Gaston County* v. *United States,* 395 U.S. 285. It may impose its burdens far into the future and far across the land. *Oregon* v. *Mitchell,* 400 U.S. 112, 133-134, 235, 283-284. Eliminating such encompassing injustices is a hard business; courts alone cannot do the job; other governmental bodies must do—and they have done—some part.

No doubt, it is tempting to some to believe that the job is over, that now we all can relax. The 1960's are behind us, to be sure. But the task we set for ourselves then will not be accomplished quickly; surely, it has not been accomplished yet. From the Congress to the Executive and down to smaller state institutions like the University of Washington Law School, Americans have grasped the tool of "affirmative action" and have been using it reasonably and effectively. The potential for real progress can now be seen.

The question here is whether the Court will now take that tool from the hands of those who have been using it for almost half a decade now. We urge the Court not to do so, and to let the progress along this historic path continue. Thus we urge that the judgment of the Supreme Court of Washington in this case be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

FEB 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE COUNCIL ON LEGAL EDUCATION OPPORTUNITY AS AMICUS CURIAE

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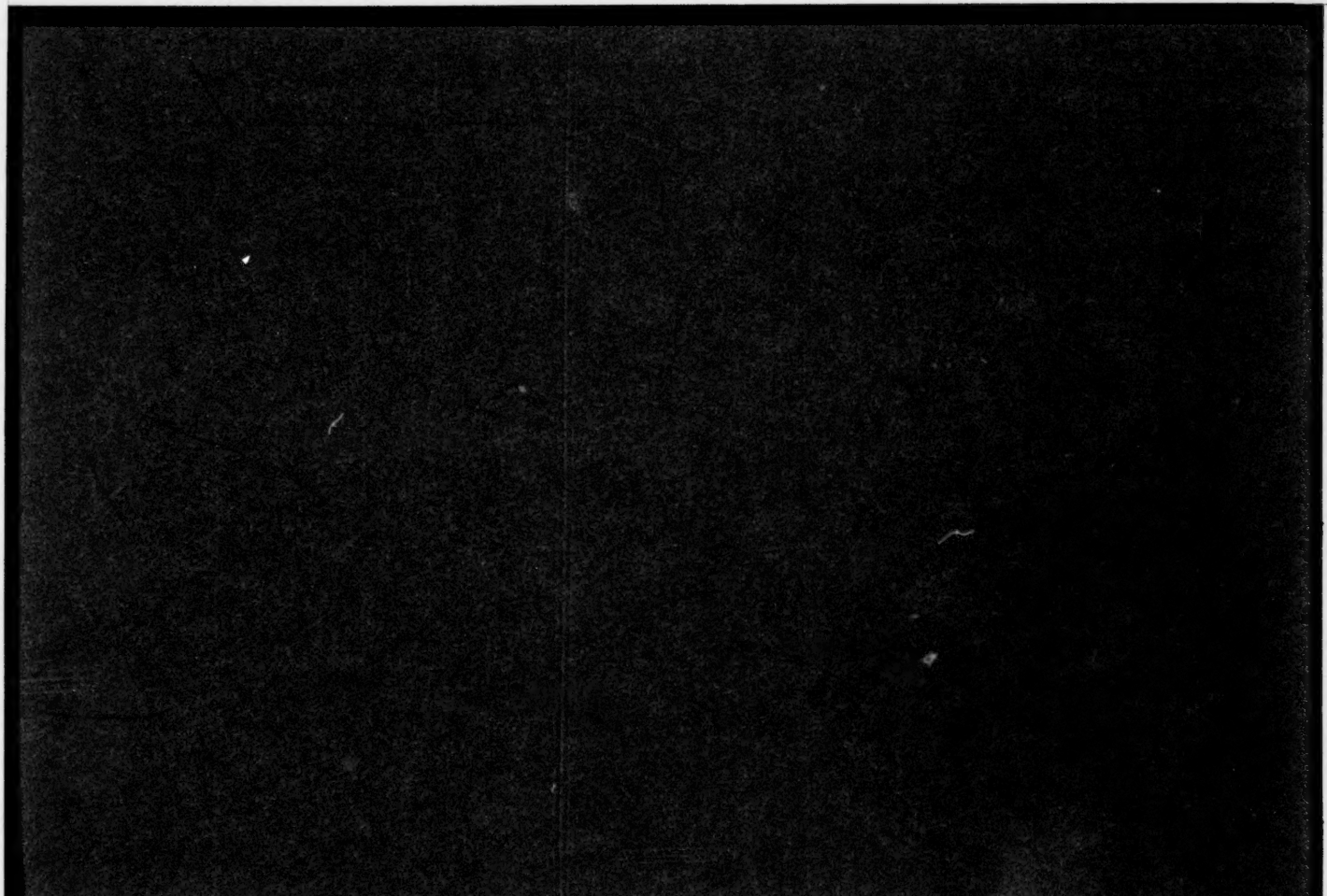

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BRIEF OF THE COUNCIL ON LEGAL EDUCATION OPPORTUNITY AS AMICUS CURIAE

CONSENT OF THE PARTIES

The Council of Legal Education Opportunity appears *amicus*, with consent of both parties, in support of the position advanced by Respondents. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

CLEO, the acronym by which the Council on Legal Education Opportunity is popularly known, is a federally funded program sponsored jointly by the American Bar Association, the Association of American Law Schools, La Raza National Lawyers Association, the Law School Admission Council and the National Bar Association. Its purpose is to provide economically disadvantaged students, many with nontraditional admissions credentials, an opportunity to attend an accredited law school and ultimately to enter the legal profession. To this end CLEO inspires and participates in recruiting programs to inform and encourage students to choose law as a career. It operates, with the cooperation of several accredited law schools, six-week summer institutes which provide selected students a means of identifying their capacity for law study and an opportunity to acclimate to that process.

The overwhelming majority of CLEO program participants are low-income minority students whose academic credentials are such that they would not be admitted on a strictly competitive basis to the schools in which they enroll. For each of the past six years several prelaw institutes were sponsored across the country to assist such students in gaining law school admission; in the summer of 1971, the year of Marco DeFunis' enrollment, the Council sponsored seven institutes. Each institute ran for six weeks and concentrated on instruction in legal analysis and synthesis, as well as, communications skills. These courses were taught by experienced law professors who conducted detailed evaluations of the participants' performance. Successful institute graduates were admitted to over sixty different accredited law schools, including the University of Washington. Nearly every student was accepted on a

preferential or "special" admissions basis and each enrolling student received a living expense stipend during his or her law school tenure.

STATEMENT AS TO FACTS

For a statement of the case, including the facts and the statutory and administrative provisions involved, reference is made to the briefs of the parties.

SUMMARY OF ARGUMENTS

Governmental race consciousness is constitutionally permissible in fashioning remedies for racial isolation and imbalance. Neither a showing of prior explicit discrimination nor a showing that no deprivation will result to others is required before a state university can take race into consideration in selecting among applicants qualified for the study of law.

Consideration of race in law school admission reflects a compelling state interest in that there is a gross underrepresentation of minorities in law schools and the legal profession. The peculiar commitment of the legal profession to the goal of equality and it pervasive influence throughout society renders underrepresentation in this sector a critical national problem.

Considerations of race by the University of Washington were not dispositive of the admissions question. Minorities admitted were in fact qualified students and their inclusion in the law student body was not tantamount to exclusion of nonminority students on the basis of race.

ARGUMENTS

I.

THE SUPREME COURT OF WASHINGTON CORRECTLY HELD THAT THE CONSTITUTION DOES NOT FORBID CONSIDERATION OF RACE IN ADMISSIONS DECISIONS.

This Court has consistently declined to hold that governmental consideration of race is *per se* unconstitutional. Each racial classification brought to this Court has in fact been reviewed with great care and sensitivity. Even where a particular use of race might harm the very groups for whose protection the Fourteenth Amendment was enacted, a *per se* holding has been avoided. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Tancil v. Woolls*, 379 U.S. 19 (1964). Where the use of race has been designed to *relieve* racial isolation or to *enhance* the opportunities of minority groups, the need for care in reviewing classifications has been no less clear.

Three years ago the case of *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), presented the question whether race might be used as a basis for remedies to relieve racial isolation in public school systems. This Court's response was unequivocal:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities." 402 U.S. at 16.

In a companion case, *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971), this Court recognized the vital role of race:

> "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also race must be considered in formulating a remedy." 402 U.S. at 45.

A. Lower Federal and State Courts and Governmental Agencies Have Permitted and Even Required Use of Race and Ethnic Status to Relieve Racial Isolation and Exclusion.

If there is an uncertainty about this Court's view on the propriety of governmental race-consciousness, no doubt exists in the lower federal and state courts. In two distinct areas–elementary and secondary education and public employment–numerous decisions recognize the constitutional validity of remedies framed in terms of race or ethnic status. (E.g., *Offerman v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967).

Several decisions merit more than simple citation because they are particularly apposite here. In *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), the United States Court of Appeals sustained a public school board plan to increase the number of black administrators by bypassing the regular promotion schedule. The court rejected a constitutional challenge by white administrators who ranked above some of the newly preferred blacks and were thus denied employment as a result of the board policy. The Third Circuit's decision clearly recognized the role of race and the permissibility of its use: "State action based partly on considerations of color, when color is not used *per se*, and in furtherance of a proper governmental objective, is

not necessarily a violation of the Fourteenth Amendment." 431 F.2d at 1237.

Another federal court of appeals acknowledged even earlier that race may validly be considered where necessary to correct racial imbalances or isolation. In a redevelopment case involving a race-conscious relocation plan, the Second Circuit declared:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931-32 (2d Cir. 1968).

More recently several courts have gone further and have *required* the use of race to increase minority group representation in public employment. Most of these cases have come not from Southern communities, but from Northern cities such as Philadelphia, Minneapolis and Boston where access to the civil service has never been denied on expressly racial or ethnic grounds. Despite a technically "open" or "nondiscriminatory" public sector, minority groups have been so seriously underrepresented in municipal employment that racially preferential and even quota hiring has been required in a number of cases. E.g., *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972). The meaning of these decisions for the present case seems quite clear: Had these communities *voluntarily* adopted preferential programs to increase minority employment, the constitutionality of such remedies would have been, *a fortiori*, beyond doubt.

In several respects the public employment and public school decisions have gone further than did the Washington Supreme Court in this case. First, they have required public agencies to be race-conscious and to prefer minority group members, rather than simply permitting voluntary consideration of ethnic status. Second, they have imposed strict numerical quotas and ratios in hiring patterns, rather than general goals or objectives of the kind announced and applied by the University of Washington Law School. Third, the public employment cases—both those that have allowed and those that have required race-conscious remedies—have often invoked race as the sole criterion for selecting among qualified persons, rather than simply as one element in a complex decision.

It has been argued, however, that such decisions are inapposite here. The claim is that racial classifications are justifiable only where they are designed to remedy prior explicit discrimination or, if such discrimination has not previously existed, only where no deprivation results to other persons. Both distinctions are unsound, if superficially persuasive.

A review of the cases in the public employment sphere reveals that a background of overt racial discrimination is not a prerequisite to race-conscious remedies. Cities like Boston, Philadelphia and Minneapolis have hired relatively few minority policemen and firemen, but not because of any explicit policy against employing blacks or Chicanos. While courts in such cases have found evidence of racial discrimination, that finding has rested upon exclusion or underrepresentation by reason of tests or other employment criteria disadvantageous or unfair to minority groups, and not upon any express color bar. See *Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D. Pa. 1972), *modified*, 473 F.2d 1029 (3d Cir. 1973); *Carter v.*

Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

Moreover, recent decisions of this Court cast doubt upon the constitutional significance of the distinction between *de jure* and *de facto* racial discrimination. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), this Court observed that "good intent or the absence of discriminatory intent" made no difference in the validity of the testing scheme if the result of that scheme were the exclusion of many minority group applicants. The appropriateness of compensatory remedies which take race into account, in other words, is not confined to situations of *de jure* discrimination. More recently, in *Keyes v. School District No. 1*, 413 U.S. 921 (1973) the distinction was eroded still further. Mr. Justice Powell declared: "The principal reason for abandonment of the *de jure-de facto* distinction is that, in view of the evolution of the holding in *Brown I* into the affirmative duty doctrine, the distinction can no longer be justified on a principled basis." If there is no reason to preserve that distinction in elementary and secondary school desegregation cases, surely the same rationale extends to higher education.

If race could be used only to overcome the effects of past *de jure* discrimination, anomalous results would follow. The very sector involved in this case, law school admissions, illustrates the anomaly. In light of this Court's decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), a preferential admissions policy at the University of Texas Law School at Austin would presumably be valid. A comparable policy at the new law school at Texas Tech University would, however, be constitutionally vulnerable because that school never practiced discrimination of the kind struck down in *Sweatt*.

Similarly, the University of Missouri law school at Columbia could presumably prefer minority applicants in light of *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938), while the University of Missouri at Kansas City would be denied recourse to such remedies. The underrepresentation of blacks in the state bar and the critical need for legal services in those communities, would therefore be relevant to one set of state-supported law schools but irrelevant to another because of the accident of history. Try as hard as they might, Texas Tech and Kansas City could never give ameliorative consideration to an applicant's race since neither school ever used race as a barrier to admission.

The perversity of this result indicates the frailty of the distinction between situations in which there has been a history of *de jure* discrimination and those in which there has not. The other proferred distinction seems equally tenuous. It has been suggested that race-based remedies are valid in other contexts because they do not jeopardize legally cognizable interests of majority group members. There is a threshold problem with this distinction: If the interests of plaintiffs in such cases were of doubtful justiciability, one would expect substantial procedural challenges. Yet there appear to be no cases seriously questioning the standing or interests of rejected white job applicants or parents of white children bussed to achieve racial balance. There are, however, more substantial flaws in this argument. While the interests of white students affected by a school desegregation order may be less clear than those of a rejected applicant to law school, the same cannot be said of a white civil servant whose place is taken by a preferred black. Indeed, any distinction may well run in the other direction. A qualified white applicant who is turned down by the University of Washington typically has other options, as did the

petitioner in this case. The white who is denied employment as a policeman or fireman faces alternatives that are certainly no more attractive and perhaps less so—unless, of course, he is prepared and able to move to another community in which no affirmative action program exists.

There is a particular irony about the distinction in this case. Not only was the petitioner admitted to several other accredited law schools; even if no preferential program existed at the University of Washington, his initial ranking among the qualified applicants suggests he would probably not have been admitted in any case. There is an especially tenuous quality to the claim that his interests are judicially cognizable while those of the white fireman in Minneapolis or the white policeman in Philadelphia are not. The conclusion should be clear: The lower federal and state courts have allowed and occasionally even required race-conscious remedies even where (a) there was no history of explicit, *de jure* racial discrimination and (b) majority group members may be displaced or disadvantaged by a preference for minority groups. The propriety of taking race into account in law school admissions decisions should follow *a fortiori*.

B. Preferential Admissions Programs Based on Race and Those Based on Educational and Economic Deprivation Are Purposively Harmonious and Constitutionally Permissible

Amici curiae in support of petitioner argue that there was no attempt on the part of the University of Washington to scrutinize individual files, or the files of all applicants regardless of race, to determine whether those to be preferentially admitted were in fact disadvantaged, either in an educational or economic sense. As their argument continues, the University posits race as the *sine*

qua non of disadvantaged status and attempts to hurdle the constitutional barrier to race by drawing a false equation between it and the deprivation required to warrant preferential treatment in the admissions process. This line of argument has two basic flaws: First, it poses a colorblindness to the Constitution that stems from myopia and attributes a literal interpretation to that concept that has never been judicially acknowledged. Second, it draws a rigid dichotomy and subtly attempts to establish a conflict which has no basis either in logic or in constitutional dogma. As indicated by Chief Judge Coffin, writing for a unanimous court in *Associated General Contractors v. Altshuler*, ___ F.2d ___ (1st Cir., Nov. 30, 1973):

> "The first Justice Harlan's much quoted observation that 'the Constitution is colorblind . . . (and) does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights', *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (dissenting opinion) has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." (Sl. Op. at 11)

Pursuit of color consciousness in order to hasten the advent of a truly colorblind approach to admission does not foreclose or conflict with the simultaneous application of a racially neutral preferential admissions system

which takes into account the economic and the educational deprivations resulting from environmental factors. Indeed, at least one Southwestern law school has formalized its own special admissions program which does exactly this and several law schools in the Appalachian region consider background deficiencies of capable nonminority applicants, as well as minorities, in determining preference. Whether the Constitution requires such balance is an open question. Seemingly there is little question as to its constitutional permissibility and its educational and moral warrants.

The recognition of race in the law school admissions process, as has been judicially approved in a number of other contexts, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Associated General Contractors v. Altshuler*, ___ F.2d ___ (1st Cir. Nov. 30, 1973); *TV 9, Inc. v. FCC*, ___ F.2d ___ (D.C. Cir. Nov. 6, 1973); *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973); *Porcelli v. Titus*, 431 F.2d 1254 (3d Cir. 1970); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966), will only speed the day when this dual approach will be rightly sacrificed to the longer term goal of colorblind admissions. The stark fact is that all minority enrollments from academic 1968-1969 to academic 1973-1974 rose from 1,902, in a total law school enrollment of 68,779, to 7,601 in a total law school enrollment of 106,760, only because law schools established affirmative action programs. But these innovations have merely carried us to the brink of progress. Now ironically we are met by opposing arguments that the constitutional fuels which propelled us to the brink are themselves offensive to that very source of legal power. While the argument in the abstract is sound, it is untimely pressed. The subordinate argument that preferences are quotas and quotas are inherently evil and

constitutionally offensive is less sound and ignores the potential use of preferences for remedial and utilitarian purposes. Admittedly, racial classifications deserve particular scrutiny; "their purpose may become perverted: a benign preference under certain conditions may shade into malignant preference at other times." (*Altshuler*, Sl. Op. at 14-15).

Nonetheless, the compelling need to create racial balance in law schools and the legal profession is manifest. Perhaps more than any other the legal profession reflects the values and mores of the dominant cultural group in America. This relationship between the larger society and legal institutions has been one of the primary reasons that minorities have been systematically denied access to the profession. Because of the pervasive impact of law throughout our society, the discriminations which infected the larger society were perhaps even more virulent and detrimental in legal educational institutions. Report of the United States Commission on Civil Rights 117 (1963); Shuman, *A Black Lawyers Study*, 16 How. L. J. 23 (1970). As a result of the invidious racial and ethnic discriminations which are now a part of history, the communities of minority citizens in this country have for the most part gone underrepresented and in many cases unrepresented. O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Toledo L. Rev. 295-99.

In an effort to remedy the effects of a long history of discrimination many law schools, like the University of Washington, have instituted programs of varying quality and effectiveness. The stated goal of these programs has been to increase the number of ethnic and racial minority lawyers in the country. This has been done without regard to specific quotas or the creation of precisely balanced racial and ethnic proportions in the profession.

It has been argued that there is no sound undergirding policy which requires that each profession reflect the racial composition of the national population. Parity, as such, should not be our long range ambition. Yet, until such time as the gross disparity which now characterizes the profession is eradicated and true openness is established, law schools must act affirmatively to meet their responsibility of providing equal opportunities for all. It is not enough to merely acknowledge past shortcomings and presently announce that admissions are now available to all qualified applicants, when the criteria for admissions are blind to those past shortcomings and ignore yesterday's injustices. More sinister than unequal treatment is the appearance of equality when inequality abounds.

The University of Washington, as well as other law schools serving both state and national constituencies, has recognized this and with no disparagement of the ability of traditional admission indicies to predict law school performance, set up a preferential system of screening and admitting students from designated minority groups which were not sufficiently represented in the non-preferential screening. The University recognized the simple fact that when nationally utilized predictive indicies were colorblindly applied the result was the exclusion of minorities. Indeed, few, if any, minorities would have been members of Washington's 1974 graduating class but for the preferences accorded. To avoid this result, the University screened minority students separately and selected capable students who demonstrated a reasonable prospect for success in law school. Other such students were admitted only after their successful completion of a prelaw CLEO summer institute. This approach, which has been replicated on a national level, has hastened the day of true colorblindness in law school admissions and has brought us to the brink of progress in creating an open legal profession.

II.

THE COURT BELOW CORRECTLY HELD THAT CONSIDERATION OF RACE IN LAW SCHOOL ADMISSIONS REFLECTED A COMPELLING STATE INTEREST.

The Supreme Court of Washington assumed that the proper test of review was whether the use of race was supported by a "compelling state interest". This Court's reference to such a standard e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967), has involved (a) classifications detrimental to minority groups and (b) criminal or other very severe sanctions. It can certainly be argued that where the classification benefits minority groups and is not backed by criminal sanctions, a less rigorous standard of review should apply. Cf. *Tancil v. Woolls*, 379 U.S. 19 (1964). Yet the Washington Supreme Court adopted the strictest test and went on to find the admissions process constitutionally valid even under that test. Accordingly, we assume that a compelling state interest must be shown.

It has been suggested by *amici curiae* that nothing less than amelioration of past racial discrimination will meet the "compelling state interest" test, and that only the agency responsible for the discrimination may constitutionally relieve its effects. While undoubtedly such a purpose would meet the test, no decisions of this Court indicate that the test should be so limited—that other substantial governmental goals and objectives may not also be "compelling state interests". Clearly persuasive in defining the test here is the fact that Washington's highest court found the law school's stated goals to constitute a compelling state interest. While the ultimate constitutional issue is of course before this Court, the careful judgment of the state supreme court on a matter of state interest surely merits substantial deference.

It has also been argued that the evidence of the state interest is insufficient, or that the Washington Supreme Court has cited inadequate indicia. The critical issue under this rubric is the *existence* of the state interest and its constitutional value, not the *methods* by which the state or its agencies have articulated that interest. Thus it should be irrelevant, for example, whether the University of Washington fully recited in catalogues and other publications the interests underlying its preferential admissions policies. The critical issue, to which we now turn, is whether those interests themselves are constitutionally compelling.

A. The Underrepresentation of Minority Groups in the Bar Constitutes a Critical National Problem.

The organized bar and the law schools have only recently become aware of the critical shortage of minority group attorneys and have taken steps to alter that condition. The importance of diversity in the bar and in law school student bodies is, however, not a recent discovery. Nearly a quarter century ago this Court held, in *Sweatt v. Painter*, 339 U.S. 629 (1950), that Texas could not constitutionally exclude all black applicants from state university law schools when comparable opportunities were unavailable elsewhere in the state. Chief Justice Vinson wrote for the Court:

> "Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed form the interplay of

> ideas and the exchange of views with which the law is concerned . . . . With such a substantial and significant segment of society excluded [from the alternative black law school] we cannot conclude that the education offered . . .is substantially equal to that [offered by the University of Texas]." 339 U.S. at 634.

The faculties and students of the law schools of the United States have come increasingly to realize not only the importance of these goals announced by Chief Justice Vinson, but also the difficulty of achieving them. Despite the elimination of virtually all direct barriers to minority applicants, and the reduction of some indirect obstacles (for example, through increased recruitment efforts and financial aids), the nonwhite share of law students–outside the few predominantly black schools–barely increased between the time of the *Sweatt* decision and the mid-1960's. Thus it became apparent that a policy stronger than simple "nondiscrimination" or "color-blindness" might be needed to achieve meaningful integration.

The current commitment to increasing minority participation is fundamentally an *educational* commitment (St. 147, 218). Law school teachers and administrators have come increasingly to feel that the study of law in a racial or ethnic vacuum would be as remote from real life as would a law school curriculum lacking any practical component. Since minority groups, including their legal problems and concerns, play an increasing role in national life, legal education must fully involve and include those groups.

Moreover, the legal profession and the law schools have a special commitment to the goal of equality. If racial and ethnic exclusion is unacceptable for any professional or educational body, such conditions would be par-

ticularly reprehensible in a profession sworn to sustain the constitutional mandates of equality. Thus it is appropriate for the law schools to take the initiative, as they have at some colleges and universities, in developing measures to expand educational opportunities for excluded groups (St. 123, 419).

In addition to the importance of diversity in law schools, there is also a need to ensure equality in access to the legal profession. It is axiomatic that there can not be more minority group attorneys without increasing the number of minority law students. It is equally clear that the effectiveness of minority attorneys depends significantly on the quality of legal education available to them—another point stressed by the Supreme Court in *Sweatt v. Painter*, 339 U.S. 624 (1950). Only recently have national legal organizations become fully aware of the extent and effects of minority underrepresentation in the bar. Recent surveys reveal that scarcely 1% of the bar of the United States is black, and that even greater inequities exists for other minority groups such as Mexican-Americans, Puerto Ricans and American Indians. (For data and analysis concerning minority underrepresentation, see, *e.g.*, O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 Yale L. J. 699, 726-28 (1971); O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Toledo L. Rev. 281, 295-99; Gellhorn, *The Law Schools and the Negro*, 1968 Duke L. J. 1069; Reynoso, *La Raza, The Law and the Law Schools*, 1970 Toledo L. Rev. 809, 814-16.)

The effects of such drastic imbalance may be harder to assess than the raw data. Yet clearly an unmet need for legal services exists in the poor and disadvantaged community—a need that can be met only partially through temporary legal services programs and volunteer

agencies staffed by white attorneys who do not know the community (and in the case of the barrio may not even speak the language well). Moreover, the importance of furnishing "models" of professional and career opportunity to the young men and women of minority communities cannot be doubted. Whether the path to participation lies through private practice or politics it disproportionately requires access to the legal profession–access that has for generations been virtually unavailable to disadvantaged youth from minority groups. It is this situation that the nation's law schools and legal organizations have recognized and seek to alleviate.

Doubt has been cast upon the applicability of this analysis to the University of Washington's admissions criteria. The proportion of blacks in the general population of Washington and surrounding states is said to have approximated the share of blacks in the law school enrollment. There are a number of answers. First, the need and the problem to which the University of Washington addressed itself is a *national* problem. Lawyers do not study and remain in a single state, as increasing use of the national bar examination indicates. Nor can a law school which draws its students from the entire nation confine its policies to strictly local needs. Second, even if Washington state were the relevant market, the percentage of blacks in the bar in the late 1960's presumably fell short of proportionality. Since the goal of the admissions program was to increase the number of black *lawyers* and not simply *law students*, the bar figures would be more relevant than the enrollment ratios. Third, the representation of other minority groups--both in the bar and in the law student body–must be considered as well.

If, however, the validity of a preferential admission program depended entirely on local demographic data, the consequences would be bizarre. The University of California at Berkeley and UCLA could take race into account, while the University of Washington could not. The University of Maine could prefer Indians but not blacks. Ironically, those law schools in areas of relatively low minority population could not preferentially increase their small minority enrollments, while schools located in areas of high minority concentration would be left to intensify an already heavy burden. What the University of Washington has tried to do is to meet a national as well as a local problem. It would be the height of irony to hold that the scope of its effort is constitutionally constrained by the present population ratios. Such a judgment would contain the very vice of strict quota admissions which the University of Washington, acting flexibly, sought to avoid.

B. The Taking of Race Into Account in Admissions Decisions Is Both a Sufficient and a Necessary Means of Meeting This Problem.

If the goals outlined above could be met without considering race or ethnic group membership, the case might be less persuasive. But there now appears to be no viable alternative. Clearly simple "non-discrimination" will not measurably enhance graduate and professional opportunities for minority students, since the bar membership figures cited earlier have remained remarkably constant despite the formal elimination of racial discrimination by all law schools. The causes of the problem lie deeper, suggesting that the rigid and unbending application of quantitative admissions criteria would continue to exclude the bulk of qualified minority applicants.

The foregoing argument contains an important caveat. No race-conscious or preferential program should exceed the period of its justification. The need for ameliorative admissions policies is hopefully a temporary one. Several forces already at work should gradually diminish that need—the steadily increasing number of minority college graduates; the improving quality of undergraduate education for minority students; the increasing availability of financial aid for minority students; the existence of supplemental education programs for such students; the growing representation of minority groups on law faculties; and the wider dissemination of information about minority career opportunities in law. When such factors bring minority groups into a fully competitive admissions position, the rationale for special or racially preferential admissions programs would presumably cease and such programs should terminate.

C. The University of Washington's Admissions Policy Does Not Result in the Admission of "Unqualified" Students.

It has been charged, and is suggested in some briefs in this case, that the policy under review resulted in the admission of students who were "unqualified" to study or practice law. Clearly that is not the case. In recent years, the number of applicants for law schools has grown so much faster than the number of available positions that many schools have far more qualified candidates than they can accept. The admissions process thus requires a complex selection among a larger number of persons, who could complete the law school curriculum and enter the legal profession. Under these circumstances, it is impossible to apply strict numerical rankings; at the center of the applicant curve, a small fraction of a point

may reflect dozens of persons. Thus, inevitably non-numerical criteria enter the process.

The claim that unqualified students are preferentially admitted also assumes that "qualification" can be measured solely by quantitative tests. Most law schools, including the University of Washington, make that judgment in subtler and more complex ways and look to factors other than LSAT scores and undergraduate grades as predictors of success. Individual students may in fact be "preferred" because of age, experience, interests, undergraduate major, declared commitment to a special field of law, recommendations, etc. Many admissions decisions may and do depart from strict neutrality on grounds having nothing whatever to do with race.

D. The Preferential Admission of Certain Minority Applicants Does Not Reflect Exclusive Reliance on Race.

The superior court found that certain minority applicants were admitted to the University of Washington law school with lower test scores and college grades than certain rejected nonminority applicants. The significance of this finding can easily be exaggerated. Clearly race was not the sole or dispositive factor. The vast majority of the applicants who were accepted were white-Anglo, as were the bulk of those rejected. This case is a far cry from those in which, cf. *Sweatt v. Painter*, 339 U.S. 629 (1950); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), all persons of a given race or ethnic group were completely barred from law school. Nor was there any predetermined number of "slots" which would be filled by minority applicants regardless of qualification or preparation. In fact, there does not appear to have been even the kind of "goal" or "range" for minority

representation that has been sanctioned in other contexts, cf. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 584 (1971).

Each admissions decision was made carefully on the basis of a number of factors, and the number of minority students in the first year class resulted from this complex process. Various elements were given preferential consideration—much as the petitioner argued in his complaint that as a taxpayer and resident of the State of Washington he should be entitled to favorable treatment. The exercise of professional judgment in each case is an essential element in the University of Washington's law school admissions process.

Moreover, some of the minority students were admitted only after and on the basis of satisfactory completion of a CLEO institute—a supplemental, pre-law program taught by regular law faculty members, dealing with pertinent material and evaluated in accordance with law school criteria. In such cases, the tempering of the admissions judgment reflected the experience and success in the institute quite as much as it reflected race or ethnic status. If this Court were to hold that CLEO students (having successfully completed the institute) could not be admitted ahead of other students who had received no such pre-law training, that would effectively nullify the educational value of the institute.

Moreover, the role of race is qualified by the ameliorative effects of certain financial aid funds available to minority students. CLEO graduates, for example, begin each year with a guaranteed stipend in addition to whatever scholarship, loan and work-study funds are provided by the school itself. Many other applicants bring to law school pressing financial needs with less hopeful prospects for their alleviation. An admissions committee

might reasonably conclude that a minority student, thus assisted, was a better risk than a non-minority student less well provided for.

Supplemental education assistance may have a similar effect. Many law schools have adopted special co-curricular and tutorial programs for disadvantaged and minority students, designed to supplement deficiencies in undergraduate education. The effect of these programs on minority student attrition rates has been impressive. A law school admission committee might conclude that the availability of such a program, like special financial aid, would improve a minority applicant's prospects and thus further justify a preferential admission decision.

Finally, an admissions committee might well take into account certain critical needs for legal services in deciding which qualified applicants should be admitted. Since the greatest needs exist in the socio-economically disadvantaged areas, a preference for students from those areas might be justified by the belief that such students would return to their communities after graduation. (Important values may be served even if they do not return--for example, the diversification of the bar and the creation of "role models" for younger members of historically underrepresented groups. Thus there need be no proof of a commitment to return to the community of origin to justify such a preference.)

A policy of race-conscious admissions such as that adopted by the University of Washington seeks to meet a critical national problem in the only way that has been found workable and effective. It does so by taking race into account along with many other factors in selecting a relatively small class from a large pool of qualified applicants. If this Court were to hold that race and ethnic status can play no part whatever in the admissions process, such a holding would virtually ensure a con-

tinued and severe underrepresentation of minority groups in the American legal profession.

CONCLUSION

For the foregoing reasons *amicus curiae* respectfully submits that the judgment of the Supreme Court of the State of Washington should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

FEB 1 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

—v.—

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DeFUNIS, *et al.*,

Petitioners,

—v.—

CHARLES ODEGAARD, President of the University of Washington, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of Washington

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS *AMICUS CURIAE*, IN SUPPORT OF RESPONDENTS

Interest of the Amicus

The National Conference of Black Lawyers (NCBL) is an incorporated association of approximately 500 black lawyers in the United States and Canada, and 2,500 law students affiliated with NCBL through their membership in the Black American Law Student Association (BALSA).

Since its inception in December of 1968, NCBL, through its national office, local chapters, co-operating attorneys and the BALSA organization, has (1) carried on a program of litigation, including defense of the politically unpopular and affirmative suits on community issues; (2) monitored governmental activity that affects the black community, including

judicial appointments, and the work of the legislative, executive, judicial and administrative branches of government; and (3) served the black bar through lawyer referral, job placement, continuing legal education programs, defense of advocates facing judicial and bar sanctions, and watchdog activity on law school admissions and curriculum.

The latter activity is of crucial importance. Despite the progress made as a result of law school programs such as that under attack here, the number of black and other minority-group lawyers remains seriously short of the need. The legal representation available to most black people remains either non-existent or inadequate.

For example, NCBL attorneys have been involved in the cases of black activist individuals and groups who, despite their racially-connected difficulties, were deemed ineligible for legal assistance by the nationally-recognized civil rights organizations. Offering them an alternative to "radical" lawyers, NCBL has provided technically sound, sympathetic representation to, *inter alia*, Angela Davis, Martin Sostre, H. Rap Brown, the Cornell Students, the Republic of New Africa, and the Attica Inmates.

Minority-group lawyers have a unique role to play not merely in representing activists, but in implementing the civil rights statutes and decisions gained during the past generation. The nation's law schools, after much thought and experimentation, have evolved sound programs designed to identify and train minority lawyers qualified to perform these tasks. NCBL joins the many groups who urge this Court that these programs are vitally necessary, educationally appropriate, and constitutionally sound.

Consent to Filing

This Amicus Curiae brief is filed with the written consent of counsel for the parties in this proceeding.

Opinions Below

The opinion of the trial court, Superior Court of the State of Washington, County of King, is not reported. The opinion of the Supreme Court of Washington is reported in 82 Wn. 2d 11, 507 P. 2d 1169.

Question Presented

Whether a state law school's admissions policy that takes cognizance of race to insure fair consideration of minority group applicants and remedy their past exclusion from the legal profession violates the Constitution where such policy is voluntarily adopted rather than judicially ordered to correct proven discriminatory practices.

Statement of the Case

Petitioner DeFunis is white. He sought and failed to gain admission to the respondent law school in both 1970 and 1971 (St. 13, 22). In the wake of his second rejection, he filed suit in state court alleging that the school's admissions policies discriminated against him by granting admission to veterans, nonresidents and members of disadvantaged minority groups, many of whom he alleged presented credentials and qualifications inferior to his own (App. 12-15).

The trial court, despite voluminous and uncontroverted testimony that the admissions procedure utilized by the respondent law school contained both quantifiable and non-quantifiable factors, concluded that entitlement to admission was equatable with mechanical credentials, *i.e.*, a numerical predictor of first-year performance obtained by a formula utilizing a portion of an applicant's undergraduate grades and the score obtained on a nationally-standardized Law School Admissions Test (LSAT). Interpreting *Brown v. Board of Education*, 347 U.S. 483 (1954), as a bar to any consideration of race, the lower court held that the admission of

minority students with lower prediction averages violated petitioner DeFunis's rights under the equal protection clause of the Fourteenth Amendment. The admission of veterans and non-residents, most of whom were white, and many of whom held prediction averages lower than petitioner's was, the lower court found, not based on race, and thus was "quite proper" (App. 57).

The respondent law school selected its 1971 first-year class, limited to 150 students, from a record-high total of 1,601 applicants (St. 334-35), at least half of whom could probably do "good work at the University of Washington." (St. 155). Balancing grades and test scores with evidence of "ability to make significant contributions to law school classes and to the community at large" (Ex. 45), the Admissions Committee sought to select a diverse range of talented male and female students from a variety of geographical, academic, social-class and racial backgrounds (St. 31, 218, 360-61).

The committee admitted most (St. 340) but not all applicants with a combined LSAT and grade-point prediction average above 77 (St. 343, 406), and rejected most but not all applicants with scores below 74.5 (St. 341-42). Applicants with averages between these two figures, including petitioner, were assumed capable of performing law school work, and were classified according to an evaluation of their transcripts and a review of non-numerical evidence of potential in letters of recommendation, the applicant's statement and record of achievement (St. 338-39). All minority applicants were similarly reviewed (St. 341-42, 399). Forty-four minority applicants were admitted, 18 of whom subsequently enrolled (App. 50). Six of those admitted had higher prediction averages than DeFunis (App. 52). Thirty-six had lower averages than did petitioner (App. 50), but so did 38 white admittees, including 22 returning from the military, and 16

deemed worthy of invitations based on other information in their files (Ex. 44). Of the 311 students admitted, 224 had higher prediction averages than petitioner (St. 366-67).

University of Washington President Odegaard testified that the special attention given minority-group applicants by the Admissions Committee accorded with a University-wide policy (St. 108-09, 416) adopted in 1963 when school officials realized that an "open door" at the point of entry to the University was not enough, in view of the cultural conditions and the separation of minority students from conventional backgrounds, to alter the virtually all-white composition of the University's student body (Tr. 223-24).

The President (St. 241-43), as well as law school officials (St. 163-64), consistently denied that giving increased weight to evidence obtained from the background of minority applicants with lower grade and test score credentials to ascertain motivation and the capacity to overcome previous disadvantages (St. 242) constituted a lowering of standards or qualifications. They pointed out that greater reliance could be placed on other criteria in evaluating minority applicants. For example, successful completion of the pre-law program sponsored by the Council on Legal Education Opportunity (CLEO) serves as a reliable predictor of law school performance (St. 90, 121-25).

University of Texas Law School Professor Millard Ruud, a consultant on legal education to the American Bar Association (St. 119-20), explained that the LSAT was "exceedingly important" as a predictor of law school performance, but he warned that it is not a "precise measure" like "an apothecary scale," and "no substitute for human judgment and evaluation." (St. 128). With minority students, he testified "that there is a greater need for exercise of judgment of looking at,

examining the transcript, examining all other data . . . ." (St. 129). An LSAT official supported Professor Ruud's statements, characterizing the LSAT as an interpretive rather than a precise predictive tool (St. 184), that alone will not provide an accurate indication of law school potential (St. 197-98).

Respondents uniformly maintained that they sought, not a racial quota (St. 353, 420), but a "reasonable representation" of minority-group students in the 1971 class (St. 416, 426-27). They asserted their aim was not to discriminate against petitioner DeFunis, but to further the University's goal of assisting historically suppressed and excluded minorities into the mainstream of society (St. 416), and improve the educational environment of the law school (St. 418). The special procedures given minority applications, adopted after the University's "open door" policy failed to produce results, were justified by President Odegaard because color-blind admissions function "to deprive segments of American society from opportunities that other segments of society have and that something more than a sanitized mechanical system is required to solve this problem in finding the true potential of individuals." (St. 243).

A majority of the Supreme Court of Washington concluded that the respondents' consideration of race in admitting students was necessary to the accomplishment of a compelling state interest.

Summary of Argument

Legislative and judicial declarations of racial equality do not automatically eradicate conditions and remedy deprivations that led to their promulgation. Meaningful implementation requires adoption, usually under a specific legal mandate, of color-conscious corrective policies designed to provide those excluded by race with the opportunity to compete on an equal basis for the places from which they were excluded.

But a state law school, cognizant of the historic exclusion of minority groups from he legal profession, may voluntarily adopt a modest affirmative action admissions program reasonably intended to ameliorate past exclusionary patterns without violating the rights of non-minority applicants whose chances for admission may be lessened by such programs.

ARGUMENT

The respondent law school's minority-admissions policy is a constitutionally appropriate effort to remedy the effects of long-standing racial discrimination in the legal profession.

The National Conference of Black Lawyers, along with black people generally, fervently hope that a time will come when all affirmative action admissions policies can, by the application of equal protection standards carefully developed by this Court, be held unconstitutional.

The central purpose of the Fourteenth Amendment was to eliminate official racial discrimination, and to realize that purpose, this Court has scrutinized with great care state-imposed racial classifications, deeming them "constitutionally suspect," . . . and subject to the "most rigid scrutiny" . . . *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964). It is not clear that the Court intended to apply this standard to efforts clearly intended to redress racially discriminatory conditions as well as to those laws that subordinated blacks and other minorities on the basis of race. In any event, *amicus curiae* hope a time will come when black law school applicants will not have experienced racial discrimination in the form of, *inter alia*, inferior public schools and racially limited employment and housing opportunities. They will have overcome societal handicaps sufficiently to present grades and test scores in ranges indistinguishable from those offered by whites. The percentage of black law students in the schools and lawyers in the profession will then approximate the percentage of their white counterparts. At that time, blacks

will no longer need an affirmative action program, and its adoption by a law school might well be found unconstitutional.

Unfortunately, the minority applicants who applied for admission to respondents' law school in 1971 were not born in a racism-free society. A century after enactment of the Fourteenth Amendment, and a generation after *Brown v. Board of Education*, 347 U.S. 483 (1954), the transition from the status of slaves to the equality of opportunity enjoyed by white citizens is still underway. To assume, as the trial court did, that this Court's decisions enunciating the rights of blacks to racial equality requires no compensatory remediaton confuses signposts to a goal with the goal itself.

I. Some consideration of race is necessary to remedy disadvantages imposed because of race.

Resistance to desegregation plans, including charges that such plans discriminate against whites, have marked virtually every step taken to secure equality of opportunity to racial minorities. Courts have heard and generally rejected such charges, recognizing with one legal scholar "that we can have a color-blind society in the long run only if we refuse to be color-blind in the short run." B. BITTKER, THE CASE FOR BLACK REPARATIONS 120 (1973).

The facile doctrine that "The Constitution . . . does not require integration. It merely forbids discrimination." *Briggs v. Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955), has been rejected in school desegregation cases. *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The use of culturally biased standardized tests and unvalidated employment qualifications,

despite their superficial appearance of fairness, have been characterized as "built-in headwinds" for minority groups in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Voting requirements have been struck down when their effect was to burden minorities handicapped by the effects of prior state-supported discrimination. *Gaston County v. United States*, 395 U.S. 285 (1969).

In each of these major decisions, the standard of effecting remedy is keyed to recognition of race, and lower courts, relying on these standards, have approved or ordered racial classifications to avoid or eliminate racial inequality. "Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F. 2d 920, 931-32 (2d Cir. 1968). See also, *United States v. Jefferson County Board of Education*, 372 F. 2d 836, 876-77 (5th Cir. 1966). Racial classifications, including racial percentages and quotas have been approved to correct racial discrimination in literally hundreds of civil rights cases. Note, *Race Quotas*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 128 (1973).

In the area of employment discrimination, *Carter v. Gallagher*, 452 F. 2d 315 (8th Cir. 1971), is one of a series of cases requiring police and fire departments to hire one qualified minority person for every three whites until a certain percentage of minority persons has been hired, even if more qualified non-minority candidates must be bypassed. And in the "hometown plan" cases, *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3d Cir. 1971), courts have required builders and construction unions to meet pre-set levels on minority hiring and training.

In school desegregation cases courts have followed the directions in *Swann, supra*, regarding racial percentages as tools to facilitate elimination of prior policies that discriminated on the basis of race. Indeed, state statutes attempting to bar assignment of students on a racial basis have been declared unconstitutional. *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D. N.Y. 1970), *aff'd*, 402 U.S. 935 (1971).

II. A judicial finding of racial discrimination is not a condition precedent to adoption of a valid minority admissions program.

In most school cases, proof that discrimination has occurred iis presented, but the authority to order affirmative relief is not conditioned on judicial findings of responsibility for the racial deprivation, but on the presence of the deprivation itself. It is on this basis that courts have upheld voluntary actions by school boards intended to correct racial imbalance against challenges by white parents and teachers. *Offermann v. Nitkowski*, 378 F. 2d 22 (2d Cir. 1967); *Porcelli v. Titus*, 431 F. 2d 1254 (3d Cir. 1970), and see several additional cases discussed in *Tometz v. Board of Education, Waukegan City*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968). Even courts that refused to order school desegregation without proof that the school board was responsible for the racially-isolated schools, suggested that the Constitution permitted voluntary desegregation plans. *Deal v. Cincinnati Board of Education*, 369 F. 2d 55, 61 (6th Cir. 1966); *Springfield School Comm. v. Barksdale*, 348 F. 2d 261, 266 (1st Cir. 1965).

Often, the deprivation intended to be eased by a racial classification is societal in scope, not specific or attributable to a single law or policy. The several laws and decisions concerning American Indians are an example. See *e.g., Sim-*

mons v. Eagle Seelatsee, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd per curiam,* 384 U.S. 209 (1966), upholding a federal statute's racial classification which limited the rights of inheritance to the Yakima Indian allotments to descendents of "one-fourth or more blood" of the Yakima tribe. *Cf. Mancari v. Morton,* 359 F. Supp. 585 (D. N.Mex. 1973), where the court rules that a federal employment statute granting a perference to Indians must give way to the Equal Employment Opportunity Act of 1972, on a record reflecting the adverse effect on non-Indians, and no evidence to show any national-public purpose to be served by the preference statute.

Consider also *T.V. 9, Inc. v. F.C.C.,* __ F. 2d __, 42 U.S.L.W. 2245 (Nov. 13, 1973), in which the Ninth Circuit held that

> Color blindness in the protection of the rights of individuals under the laws does not foreclose consideration of stock ownership by members of a black minority where the commission is comparing the qualification of applicants for broadcasting rights . . . . Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to black participation among principals of applicants for television rights. However elusive the public interest may be it has reality. 42 U.S.L.W. at 2246.

III. Respondents' minority admissions plan is not rendered invalid because it alters expectations rooted in societal patterns that perpetuate racial inequality.

In addition to urging the Court not to approve affirmative action plans unless they remedy past, specific racially discriminatory actions, *amici* briefs supporting petitioner

DeFunis argue that such plans may impose no new deprivation on other innocent parties such as petitioner. The position seeks to resurrect the proposition that it should be possible to remedy racial injustices against blacks without diluting the privileges and expectations which whites had hitherto enjoyed. Wechsler, *Toward Neutral Principles of Law*, 73 HARV. L. REV. 1, 15, 31-34 (1959). But whether intended or not, others did benefit from policies that excluded minorities. Thus, when corrective action is taken, the impact will be felt by those who enjoyed – however innocently – privileges and expectations which belonged to others. *Local 189, United Papermakers and Paperworkers, AFL-CIO v. United States*, 416 F. 2d 980 (5th Cir. 1969); Hughes, *Reparations for Blacks?* 43 N.Y.L.J. 1063, 1072 (1968).

To suggest as does petitioner that public school desegregation plans are distinguishable because, unlike the case at bar, no white student is actually excluded from school, demeans the sincere, if misguided, concern that motivates white parents to oppose these plans in court, and ignores the serious consideration courts have given to the resolution of the competing interests posed by such litigation. There is sacrifice involved in these cases as even the most committed integrationist must concede after studying Mr. Justice Powell's concurring and dissenting opinion in *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 217 (1973). Or read Judge Weick's strong dissent against the busing plan approved in *Northcross v. Board of Education of Memphis*, 466 F. 2d 890, 898 (6th Cir. 1972).

> It is not claimed that these unfortunate children, who are the victims of induced busing, have committed any offense. And we are living in a free society in which one of the privileges is the right of association.

> The average American couple who are raising their children, scrape and save money to buy a home in a nice residential neighborhood, near a public school. One can imagine their frustration when they find their plans have been destroyed by the judgment of a federal court.
>
> The elimination of neighborhood schools necessarily interferes with the interest in and participation by parents in the operation of the schools through parent-teachers' associations, interferes with activities of children out of school, and interferes with their privilege of association, and it deprives them of walk in schools. It can even lower the quality of education. 466 F. 2d at 898. See also, *Anderson v. San Francisco Unified School District,* 357 F. Supp. 248 (N.D. Cal. 1972).

The Washington Supreme Court is not unaware of the dislocations desegregation may cause. In approving a Seattle voluntary school desegregation plan, the court found the board could use race as a criterion whether the nature of the segregation was *de jure* or *de facto,* and that busing was within the authority of school officials despite awkwardness, inconvenience and other burdens. *State ex rel. Citizens Against Mandatory Bussing v. Brooks,* 80 Wash. 2d 121, 492 P. 2d 536 (1972).

Sacrifice incurred during the process of remedying racist conditions is not limited to whites. The loss suffered by black children during the long years required to give real meaning to *Brown I,* under the "all deliberate speed" standard of *Brown II,* is incalculable. Nor have the burdens of implementation been uniracial. Black students have lost community schools, *Allen v. Asheville City Board of Education,* 434 F. 2d 902 (4th Cir. 1970); *Norwalk CORE v. Norwalk Board of Education,* 423 F. 2d 121 (2d Cir. 1970), and black teachers

have lost their jobs, see *amicus curiae* brief for the National Educational Association, *United States v. Georgia*, No. 30, 388 (5th Cir. 1971) at 920-21. Some courts have gone to shocking lengths to further integration even at the expense of prior commitments to minority groups. Thus, in *Otero v. New York City Housing Authority*, — F. 2d —, 42 U.S.L.W. 2185 (Oct. 9, 1973), the Second Circuit held that the Authority could refuse to rent new housing to displaced minority-group residents where such rentals would create a "pocket ghetto" and violate its affirmative duty to integrate public housing.

The dislocations of desegregation programs suffered by blacks and whites are an unfortunate concommittant of social change. They are not equatable with nor do they herald a return to the restrictive quotas imposed on Jewish students by some colleges 50 years ago. Contrary arguments in the *amicus* brief supporting petitioner's Jurisdictional Statement filed by the Anti-Defamation League of B'nai B'rith at 24, reflect far less faith in this society's ability to equitably solve its racial problems than has been exhibited by those blacks and other minorities who, despite all, are still seeking opportunities for success and achievement now enjoyed by previously victimized religious and ethnic groups in this country. The fears that moderate plans of racial remediation will somehow escalate to levels that threaten legitimate interests because they expressly use race and not some disingenuous synonym like "cultural disadvantage," are unwarranted, given the moderate character of respondents' plan, which at 1971 enrollment levels will require many decades before the disparities in the number of minority lawyers in Washington state are substantially reduced.

Moreover, the voluntarily-adopted policy of respondents under review here is no less reasonable, appropriate and immune to charges of "reverse discrimination" or "racial

quota" than were the school plans set forth above. Despite the efforts by petitioner's counsel at trial, the Record shows that law school personnel followed the dictates of their experience and the instructions from LSAT officials, and considered the mechanical credentials, grades and LSAT scores, as important measures in determining qualifications, and not as the sole criteria for selection.[1] There were simply

[1] A law school would be, at least, remiss were it to rely heavily on standardized tests in gauging minority applicants' qualifications in view of the past use of tests in civil rights cases. Guinn v. United States, 238 U.S. 347 (1915); Schnell v. Davis, 336 U.S. 933 (1949); Alabama v. United States, 371 U.S. 37 (1962); Louisiana v. United States, 380 U.S. 145 (1965); Gaston County v. United States, 395 U.S. 285 (1969); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Baker v. Columbus Municipal Separate School District, 462 F. 2d 1112 (5th Cir. 1972); Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir. 1972).

Validation studies thus far undertaken to measure the accuracy of the LSAT for minority students indicate that it has value as a predictor, Schrader, Pitcher, *Predicting Law School Grades for Black American Law Students*, Law School Admission Council (Mar. 1973), but critics point out that such tests cannot measure attitude, motivation, ability to empathize, and other qualities needed in practice. Ramsey, *Law School Admissions: Science, Art or Hunch?* 12 J. LEGAL ED. 503, 517 (1960).

At best, they predict first year grades, not law school performance or professional competence. There is even basis to fear that the accuracy of first year predictions may be attributable in part to a self-fulfilling prophecy effect on the student and his teachers. R. ROSENTHAL, L. JACOBSON, PYGMALION IN THE CLASSROOM (1968); Kagan, *The IQ Puzzle: What Are We Measuring?* No. 14 INEQUALITY IN EDUCATION, 5 (Jul. 1973).

To the extent that standardized test scores are "culturally biased" in favor of white, middle class examinees, Hobson v. Hansen, 269 F. Supp. 401, 476-88 (D. D.C. 1967), over-reliance on LSAT scores would present barriers to minority applicants quite similar to the "alumni character recommendations" struck down in the college desegregation cases. Meredith v. Fair, 305 F. 2d 343, 351-354 (5th Cir. 1962); Hunt

too many white applicants admitted with lower mechanical scores than petitioner and too many whites who were denied despite higher scores to support his position that his rights were violated because of the admission of minority students with "lower qualifications."

The selection process is not a scientifically precise one, relying of necessity in some degree on intuition rather than engineering, but it is sufficiently within the standards for administrative agency action set in cases like *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), to earn judicial respect for its judgment and the reasonableness of its action, especially in an educational policy question. *San Antonio Independent School District v. Rodriquez*, 93 S. Ct. 1278, 1301-02 (1973); *Dandridge v. Williams*, 397 U.S. 471 (1970). See, Anderson, *The Admissions Process in Litigation*, 15 ARIZ. L. REV. 81 (1973).

Here, the respondents' affirmative action policy is correct as well as reasonable. While several of the minority applicants presented comparatively low mechanical credentials, they had completed the CLEO program or had other experiences or characteristics justifying a decision that they could perform law school work and contribute to their classes while in school, and to their communities after graduation. In measuring professional school potential of minority applicants, it is most appropriate to consider the disadvantages and handicaps that in varying degrees each of them, regardless of their socio-economic status, has had to overcome. These societal obstacles have been identified by social scientists, see, *e.g.* J. KOVEL, WHITE RACISM: A PSYCHOHISTORY (1970); A. KARDINER AND L. OVESEY, THE MARK OF OPPRES-

v. Arnold, 172 F. Supp. 847 (N.D. Ga. 1959). *Cf.* Local 53, Intern. Assoc. of Heat and Frost Insulators, and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969).

SION (1962); W. GRIER AND P. COBBS, BLACK RAGE (1968), and recognized by this Court. *Brown v. Board of Education, supra.*

The reasonableness of respondents' minority admissions program is not weakened by suggestions that it is patronizing to minorities. Indeed, such a characterization might more readily fit the respondents' refusal to adopt such a program since such refusal would imply that the absence of minority law students was due to shortcomings generic to the group rather than the deprivations of opportunity unfairly placed on them by society.

Minority students are not stigmatized by respondents' admission policies, although the adjustment difficulties may exceed those of their white classmates. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 TOLEDO L. REV. 539. But the Constitution does not guarantee, nor do minority students seek, a "free ride" through law school. An opportunity for admission based on a fair range of prediction criteria is all they seek, and considering their past exclusion from the legal profession, the respondents' moderate program is, at least, constitutionally appropriate.

The Washington Supreme Court found the factors justifying respondents' minority admissions program constituted a compelling state interest. This characterization should not be disturbed even if the Court finds that the program is not required by federal law. *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* ___ F. 2d ___ , 42 U.S.L.W. 2320 (Dec. 25, 1973).

IV. The historic exclusion of racial minorities from the legal profession justified respondents' affirmative efforts to attract qualified minority applicants.

The Constitutional appropriateness of the respondent law school's minority admission policies need not be assumed. The dearth of black lawyers which respondent officials hope their admissions policies will help to alleviate, did not occur by chance. It is directly related to a pattern of systematic exclusion of blacks from the legal profession that dates back to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The finding in that decision that no blacks were citizens, whether slave or not, served as a barrier to blacks being admitted to practice, since virtually all the states required citizenship as a qualifying condition for admission to their bars.[2] By the Civil War in 1860, there were 4,441,830 blacks in the country, only 488,070 (11 percent) of whom were free,[3] but probably no more than eight black lawyers.[4]

The end of the Reconstruction period also marked the decline of the few black lawyers who had made some

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[2] Brown, *The Genesis of the Negro Lawyer in New England*, 22 THE NEGRO HIST. BULL. 147, 148 (1958). Brown advises that Macon B. Allen, the nation's first black attorney, was denied admission on motion under Maine law which rendered any citizen eligible for admission who produced a certificate of good moral character. Allen was rejected on the ground that he was not a citizen. He was subsequently admitted in 1844 after satisfactory examination by a committee of the Bar.

[3] P. BERGMAN, THE CHRONOLOGICAL HISTORY OF THE NEGRO IN AMERICA, 221 (1969).

[4] See Leonard, *The Development of the Black Bar*, 407 THE ANNALS, 134, 136 (May, 1973), and Brown, *supra*, note 2, Part I, 147-51, and Part II, at 171-77. Five black lawyers, Macon Allen, Robert Morris, Aaron Bradley, Edwin Walker, and John S. Rock, practiced in Massachusetts before the Civil War. John Mercer Langston became a member of the Ohio Bar in the 1850s, Garrison Draper joined the Maryland Bar in 1857, and Jonathan J. Wright was admitted to the Pennsylvania bar about this time.

advances in practice and politics.[5] As late as 1940, when the black population had grown to 12,866,000,[6] there were only about 1,063 black judges and lawyers, one professional for every 12,103 blacks.[7] Those blacks admitted to practice were excluded from the American Bar Association until 1943, when Judge James S. Watson of New York was elected.[8] Racial prejudice, combined with a continuing lack of educational and economic resources, served to curtail seriously the number of blacks who aspired to join the legal profession and limited the range of success and accomplishment for those

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[5] See Leonard, *supra*, note 4, at 137.

[6] BERGMAN, *supra*, note 3, at 486.

[7] M. DAVIE, NEGROES IN AMERICAN SOCIETY, 116 (1949). The great majority of these lawyers were trained in black law schools. Howard University opened a law department in 1868. Eleven additional schools began in the decades that followed, but only one survived until 1921. Stevens, *Two Cheers For 1870: The American Law School*, in LAW IN AMERICAN HISTORY, 405, 428, n. 16 (D. Fleming and B. Bailyn eds. 1971).

Following this Court's decisions requiring desegregation of state law schools, *infra*, note 11, several black law schools were initiated. Today, in addition to Howard, the predominantly black schools are North Carolina Central Law School, in Durham, North Carolina, Southern Unviersity Law School in Baton Rouge, Louisiana, and Texas Southern University Law School in Houston, Texas.

[8] DAVIE, *supra*, at 118. Three blacks, whose racial identity was not known, were admitted into the ABA in 1912. The long exclusion of blacks by the ABA led black lawyers to form the National Bar Association in 1925. See also, Leonard, *supra*, note at 140-43.

who somehow overcame these multiple handicaps to law practice.[9]

Until recently, white law firms, government, business as well as bar associations were closed to black lawyers who, with some notable exceptions, operated on the fringe of the profession.[10] Except for the few predominantly black

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[9] The court below cited a representative collection of published data and studies as evidence of the barriers facing blacks who aspired to a legal career. 507 P. 2d at 1182, n. 12. But it is simply not possible to gauge how many black youth have been exposed to experiences similar to the conversation with his high school teacher reported by Malcolm X. It was in the early 1940s in East Lansing, Michigan, and his English teacher, Mr. Ostrowski, who had given him good grades and taken an interest in him, asked him whether he was thinking about a career. Malcolm replied:

> 'Well, yes sir, I've been thinking I'd like to be a lawyer.' Lansing certainly had no Negro lawyers – or doctors either – in those days, to hold up an image I might have aspired to. All I really knew for certain was that a lawyer didn't wash dishes, as I was doing.
>
> Mr. Ostrowski looked surprised, I remember, he leaned back in his chair and clasped his hands behind his head. He kind of half-smiled and said, 'Malcolm, one of life's first needs is for you to be realistic. Don't misunderstand me, now. We all here like you, you know that. But you've got to be realistic about being a nigger. A lawyer – that's no realistic goal for a nigger. You need to think about something you *can* be. You're good with your hands – making things. Everybody admires your carpentry shop work. Why don't you plan on carpentry? People like you as a person – you'd get all kinds of work.' A. HALEY, THE AUTOBIOGRAPHY OF MALCOLM X, 36-37 (1964).

[10] Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1070, n. 13. See also, M. DAVIE, NEGROES IN AMERICAN SOCIETY, 115-116 (1949); Shuman, *A Black Lawyer's Study*, 16 HOWARD L. J. 304 (1971); McGee, *Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 BUFFALO L. REV.

schools, Southern law schools were completely closed to blacks until required to admit them by a series of court orders handed down over a 20-year period from the 1930s through the 1950s.[11] But even after the 1954 school desegregation decision, many Southern schools continued to refuse black applicants until the late 1960s.[12]

In the North, law schools were not formally closed to blacks, but few were admitted until the initiation of minority recruitment and admissions programs in the late 1960s. Due in part to these programs, there were 7,601 minority students in ABA approved law schools during the 1973-74 school year.[13] The 4,817 black students exceeds the estimated

423 (1971); Note, *Negro Members of the Alabama Bar*, 21 ALA. L. REV. 309 (1969); Carl and Callahan, *Negroes and the Law*, 17 J. LEGAL ED., 250 (1965).

The difficulties black lawyers have faced are pointed up by the observation of Judge Robert L. Carter, formerly NAACP General Counsel, who observed that the notable civil rights achievements of Charles Houston, Thurgood Marshall, William Hastie, Spottswood Robinson and Constance Baker Motley, and other black lawyers tends to obscure the fact that few blacks have enjoyed noteworthy success in any field of law, including that of civil rights. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 TOLEDO L. REV. 539, 541.

[11] Compare the evasive tactics employed in University of Maryland v. Murray, 169 Md. 478, 182 A. 590 (1936), with those used 20 years later in Florida ex rel. Hawkins v. Board of Control, 350 U.S. 413 (1956). In the interval, this Court had spoken clearly on the subject of segregated law schools in Sweatt v. Painter, 339 U.S. 629 (1950), Sipeul v. Bd. of Regents of Univ. of Oklahoma, 332 U.S. 631 (1948), and Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938). The higher education litigation is discussed generally in J. GREENBERG, RACE RELATIONS AND AMERICAN LAW, 260-69 (1959).

[12] Gellhorn, *supra*, note 9, at 1070.

[13] 1973 Survey of Minority Group Students in Legal Education, Association of American Law Schools (Dec. 1973).

4,000 black practitioners by a sizeable number,[14] and probably the 2,784 other minority students far exceeds the number of lawyers who belong to these groups.[15]

But expressions of satisfaction over this undoubted progress are muted by a review of comparable white statistics. The 7,601 minority-group students represent only seven percent of the 106,102 students in law schools during the 1973-74 school year. The estimated 4,000 black lawyers represent little more than one percent of the nation's 300,000 lawyers.

There is a white attorney for every 631 whites in the country. While according to the U.S. Census, there were more than 22 million blacks in 1970, this averages out to only one black attorney for every 5,500 blacks. The figure would probably be far worse if other minorities were considered, and if the number of minority law graduates not working in law-related jobs were excluded.

Available data on minority attorneys in the State of Washington reflect the national pattern. In 1970, there were 4,550 active lawyers in the State. There was a white lawyer for every 720 whites in the State, but only 20 black lawyers

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[14] See Edwards, *The New Role for the Black Law Graduate: A Reality or an Illusion?* 69 MICH. L. REV. 1407, 1432 (1971). Professor Edwards' study of hiring patterns in large mid-western law firms revealed that racial restrictions remain quite visible.

Employment concerns are not the only special problems confronting minority students. See, Parker and Stebman, *Legal Education for Blacks*, 407 THE ANNALS, 144 (May 1973).

[15] Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard*, 49 WASH. L. REV. 1, 4-5, notes 14-15 (1973).

in all (three of these were judges), five Indian lawyers, and not one Mexican-American lawyer, despite the 70,734 Mexican-Americans in Washington.[16]

The minority groups considered in the respondent law school's minority admissions program (blacks, Indians, Mexican-Americans, and Filipinos) total about 186,890 or 6.2 percent of the population. Excluding the black judges, there are only 22 minority lawyers in the State, or one minority lawyer for every 8,495 minority persons.

The use of statistical disparities to illustrate the exclusion of minorities from the legal profession is not intended to suggest that all minority people want or should be required to use lawyers of their particular group. They certainly should not be interpreted to diminish the valuable service rendered to the cause of racial equality by white attorneys. What black people are entitled to in selecting lawyers is a choice not arbitrarily limited because of state-sanctioned racial exclusion.

The Washington Supreme Court concluded from the available data that minorities are "grossly underrepresented in the law schools – and consequently in the legal profession – of this state and this nation." *DeFunis v. Odegaard*, 82 Wn. 2d 11, 32-33, 507 P. 2d 1169, 1182 (1973).

Based on the disparities reflected in these statistics, one commentator has gone further, suggesting that "While the state voluntarily undertook to provide a corrective program of law school admission it may actually have been under a constitutional duty to have done so." [17] Certainly a state law

[16] *Id.* at 37-38.

[17] *Id.* at 39.

school, faced with the significance of statistics such as those in this case, is not bound to wait for a court to mandate action based on the Constitution before adopting policies that will both comply with its words and honor its spirit.

Indeed, it is the adoption of precisely such policies that keeps alive the dream that this society may someday outgrow the need to protect its minority members against discrimination based on race, color, or creed.

For all the foregoing reasons, *amicus curiae* urge this Court to affirm the judgment of the Supreme Court of Washington.

Respectfully submitted,

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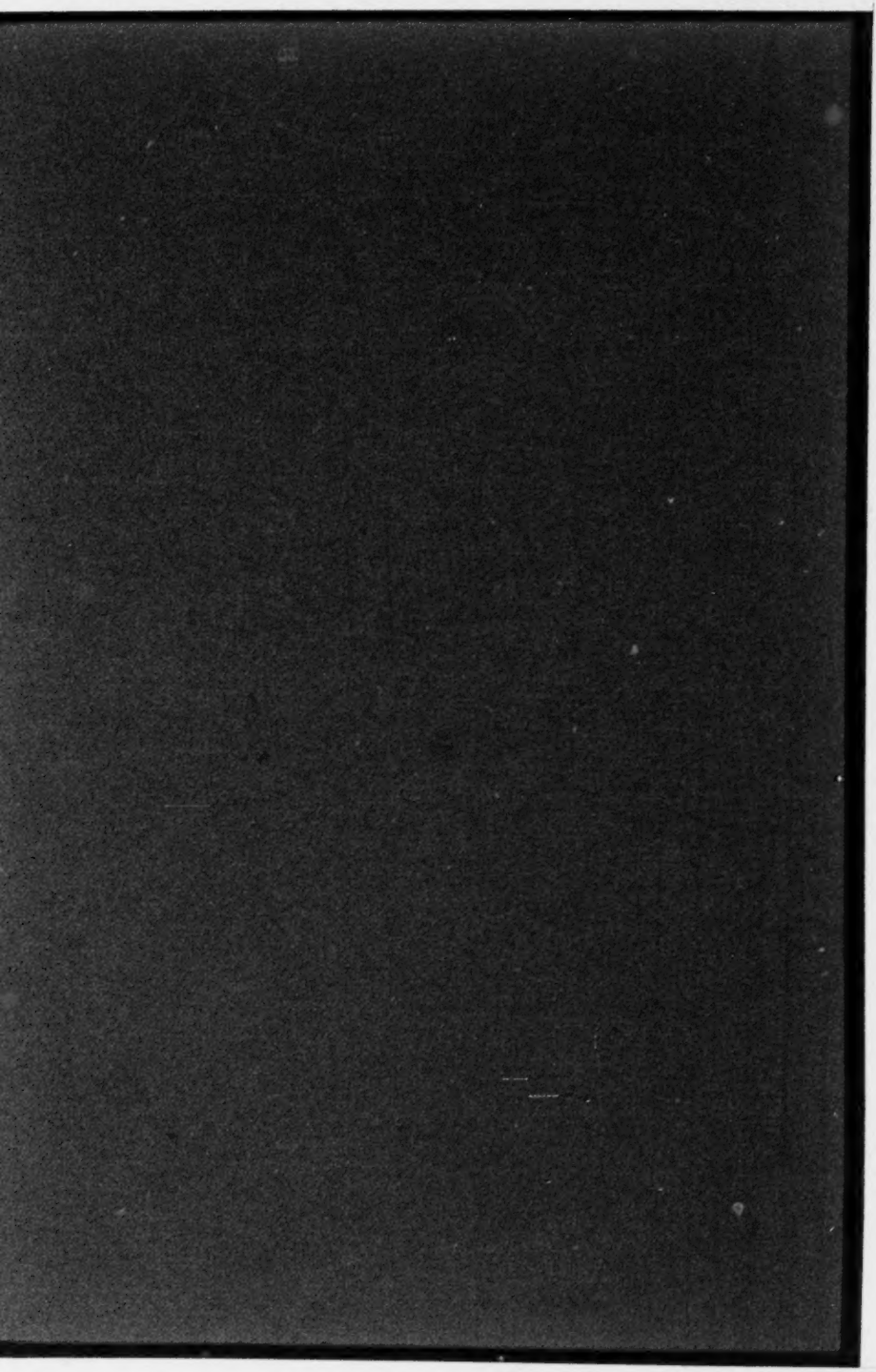

SUPREME COURT, U. S. FEB 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

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BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of the *Amicus*[1]

Amicus, NAACP Legal Defense and Educational Fund, Inc., is interested in the present case for several reasons. First, the black community has been grossly underrepresented in terms of the number of black attorneys available. To a large extent, this was due to deliberate discrimination.[2] As recently as 1968, only about one percent of the

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[1] Letters of consent from counsel for the petitioners and the respondents have been filed with the Clerk of the Court.

[2] See, *e.g.*, *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337 (1938); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); and see Leonard, *The Development of the Black Bar*, 407 THE ANNALS 134, 137-39 (1973).

total number of attorneys in the United States were black, a figure probably not substantially higher than in 1900.[3] Recent figures indicate that slightly over seven percent of total law school enrollment in the last year is minority students, including blacks, Chicanos, American Indians, Puerto Ricans, etc.[4]

In the Legal Defense Fund's experience the need for black (and other minority group) lawyers to serve their own community is clear. Although lawyers of all races have made many contributions to the cause of equal justice, it is essential that there be black lawyers who live and practice law day to day and year after year as integral parts of their communities.[5] In the main and over the long run, they are most disposed to and capable of performing services for the minorities of which they are a part.[6] Lawyers are critical to political activity, building businesses, and social development, to say nothing of legal representation in resolving public and private differences. Without an adequate number of lawyers, minority progress in all these areas will be stunted.

In order to help increase the number of black lawyers, the Legal Defense Fund administers, through its subsidiary, the Earl Warren Legal Training Program, Inc., programs to provide scholarships for black law students and

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[3] Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069.

[4] In 1972-73, there were 4,423 black students, or 4.3% of the total enrollment. This was up from only 1,254 in 1968-69. Parker & Stebman, *Legal Education for Blacks*, 407 THE ANNALS 144, 147 (1973).

[5] See Carl, *The Shortage of Negro Lawyers: Pluralistic Legal Education and Legal Services for the Poor*, 20 J. Legal Ed. 21 (1967); McGee, *Black Lawyers and the Struggle for Racial Justice in the American Social Order*, 20 Buffalo L. Rev. 423 (1971).

[6] See, *NAACP* v. *Button*, 371 U.S. 415 (1963); *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968).

assistance to black law graduates seeking to set up practice in communities without sufficient legal representation. Obviously, for the success of these programs there must be significant numbers of black law students. Over the past few years, which coincide with institution of affirmative admission programs like that at the University of Washington Law School, the Fund has had a substantial increase in the number of applications for both programs from highly qualified black students.[7]

The second interest of the Legal Defense Fund in this case arises from the possible implications of this case for a wide range of litigation. A reversal not only could undermine voluntary programs to achieve the reality (and not merely the appearance) of equal opportunity, but also could cut back sharply on the remedial powers of courts (see, *e.g.*, *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969)) and agencies (see, *e.g.*, *Contractor Ass'n of Eastern Pa.* v. *Secretary of Labor*, 442 F.2d 159 (3rd Cir. 1971) to require affirmative action.[8]

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[7] Between 1967 and 1973 over two hundred and thirty black students who were recipients of scholarship assistance from the Fund graduated from law schools. These recipients and graduates have matriculated at forty-five of the major law schools in the East, South and Mid-West, and at both national and regional law schools. At present more than three hundred and sixty are enrolled in the program.

During the same span of years the Legal Defense Fund has trained or has in training in its post-graduate fellowship program over eighty young lawyers for civil rights practice. They have distinguished themselves professionally, in politics, business and civic affairs. In each of the last two years the Fund has had almost two hundred applicants for twelve positions. Comparable ratios prevail with respect to applicants for scholarships.

[8] The question which arises in this case, in a Northern state, implicates also the South. In the South, where higher education remained segregated by law in many places until well after this Court's decision in *Brown*, effective steps to dismantle the dual system in many colleges and universities are just now commencing.

ARGUMENT

I.

The Minority Group Admissions Policies of the University of Washington School of Law Are Constitutional.

It is important to focus precisely on what the University of Washington Law School was doing, and what petitioner Marco De Funis, Jr., may complain about. The School was faced with the problem of deciding which of a large group of *qualified*[9] applicants it should admit. These decisions were made by a complex process; applicants could not, as petitioner De Funis urges, be chosen by the rigid application of mathematical formulae. A small group of students were more or less automatically admitted if they had a high Predicted First-Year Average (PFYA).

These steps were occasioned by *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), which the undersigned *amicus* sponsored. It would be a misfortune were this case to give rise to any principles which might hinder the fullest desegregation process in higher education in Southern and border states. Recently, in its responses to the previously submitted desegregation plans, which it found inadequate, the Department of Health, Education, and Welfare made clear that affirmative remedial measures must be undertaken to achieve black access to public higher education; these measures will have to be complex and far-reaching to achieve desegregation in fact.

[9] Both petitioners and certain of their supporting *amici* attempt to raise the specter of law schools admitting large numbers of unqualified black and other minority students with the result of excluding qualified whites and eventually foisting unqualified attorneys on the black community. There is no basis in the record to substantiate such a contention with regard to the University of Washington. All the testimony clearly indicates that in every instance persons were admitted who were reasonably believed to be qualified and capable of succeeding in law school and as lawyers.

Everyone else, including De Funis and most of the minority group students, went through further processing.[10]

De Funis' complaint arises because in that processing minority group students were handled separately from majority group students.[11] All applications from minority group members were given to two particular admissions committee members who compared the applications against each other. Majority group applications similarly were compared with each other. The most promising in each group were chosen and the two lists aggregated.

As to both groups much more than PFYA was considered, as indeed was proper. After all, the scale only purported to predict what grades a student would make in his first year of law school; it did not even predict his performance throughout law school or on a bar examination. It manifestly could not measure criteria at least as legitimate as the grades an applicant would receive in law school, viz., his long term success and contributions to the profession and the community. These more difficult predictions were made on the basis of not only PFYA, but also by weighing factors such as extracurricular activities, interest in community affairs, letters of recommendation, and the type of undergraduate curriculum pursued. As a result, a number of majority group applicants with lower

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[10] Thus, this case does not involve anything analogous to the "merit system," or an attack on it. A PFYA score cannot be equated with a score on a Civil Service examination, a typing test, or a driving test. Certainly, regardless of whether a strict merit system based on tests *may* be used under certain circumstances (see, *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972)), there is no constitutional requirement that it *must* be.

[11] At least one *amicus* professes difficulty with the concept of defining certain persons as members of "minority groups." This has presented no problem, however, either to Congress (see, 20 U.S.C. § 1619(9)(A), or to this Court. See, *Hernandez* v. *Texas*, 347 U.S. 475 (1954).

PFYA's than De Funis were admitted or put on the waiting list ahead of him.[12]

The question, therefore, is whether the procedure now[13] complained of by De Funis, that minority students and majority students were compared only with others in the same group, violated his constitutional rights. Simply stated, the School recognized that the PFYA is significantly less predictive of what it purports to measure for minority than for non-minority students, largely because of historic educational and social discrimination. This was the expert testimony at trial (St. 128-131) and petitioner did not rebut it. Just as the number of minority students admitted to the University as a whole had been limited by the application of standard criteria, as the President of the University testified (St. 222-229), it could be expected that if the same weight was given to the PFYA for both groups, it would operate as a "built-in headwind" [14] resulting in exclusion of minorities from the Law School.

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[12] This fact is significant, since even if there had been *no* minority admissions program this record does not demonstrate that De Funis would have been admitted to law school. He was in the lowest one-fourth of the waiting list, with at least fifty-five persons ahead of him; thirty-six minority group applicants with PFYA's lower than De Funis were sent letters of acceptance, and only eighteen accepted; even if none had accepted he apparently would not have been reached.

[13] The original complaint did not challenge his exclusion on racial grounds. In addition to the in-state resident issue, the complaint urged, in essence, a denial of due process because others had arbitrarily been admitted to the school even though they had lesser qualifications than did petitioner (A. 14-15; 17). The question of minority students was raised as a matter of defense (over the objection of petitioner's counsel (St. 230-231)) by the Law School to explain why some with lesser paper qualifications than De Funis were admitted before he was. Much of the dissenting opinion below was an attack on the procedures and standards used *generally* to select among the applicants. Whatever might be the merits of a due process attack on the method of administering the selection system, one has not been presented here.

[14] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971).

The School, therefore, took a course that was not only prudent, but perhaps constitutionally required. If it did *not* institute appropriate differential treatment of minority applicants, a combination of a low minority acceptance rate,[15] and selection by criteria which were known to have questionable predictive validity, might lead to litigation by members of excluded groups.[16]

The procedure employed—comparing minority applicants with each other, and picking the most promising from that group—avoided the perceived discriminatory effect of comparing minority students with majority ones on the basis of PFYA. The procedure was *not* designed to achieve an over-all ranking that would absolutely correspond to promise as a student and as a lawyer, since it is doubtful that the data at hand permitted a pre-law school comparison of the ultimate professional promise of the applicants, whether minority or majority. Rather, it sought to ensure that no applicants were accepted of whom respondents did not expect satisfactory achievement.

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[15] As the Fifth Circuit has cogently said, "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586, *aff'd*, 371 U.S. 37 (1962). See also, *Turner* v. *Fouche*, 396 U.S. 346 (1970).

[16] De Funis and his *amici* urge that the Law School should not have done anything about the effects of past discrimination because neither the University nor the Law School had any responsibility for it. This is an unacceptably insular way of viewing a particularized result of the national problem of racism.

This case involves a national law school, with a policy of admitting a substantial number of students from out of state. Even if the State and the institution themselves were totally free of any taint of racial discrimination, the admission of some students under criteria that operate to exclude others who were victims of racial discrimination in other parts of the country could raise serious equal protection questions. See, *Oregon* v. *Mitchell*, 400 U.S. 112, 133-34 (1970) (Black, J.) (the effects of racial discrimination, wherever it occurred, present a national problem that can be responded to even with regard to states without a history of discrimination).

One reason for the differential treatment of minority applicants was, of course, to make it possible for a significant number to be admitted to Law School. And, just as the basis for realizing that there was something wrong with rigid selection procedures was the low number of minority admissions, so the basis for weighing the effectiveness of the new method was whether the number admitted reasonably reflected the number of minority persons in the community at large. Thus, a *goal* was aimed for, but there was no quota. The distinction between the two is clear; a quota is a fixed number or set ratio that *must* be filled and, generally, may not be exceeded. A goal is a target to be used as a yardstick for judging the efficacy of a program in achieving true equality. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Ed.*, 402 U.S. 1, 25-26 (1971).

There was no quota, and at no time were minority applicants accepted who did not meet the same standard imposed on all applicants, minority and non-minority alike, *viz.*, the expectation of satisfactory achievement in law school and the profession. Indeed, the Law School could not, for the purpose of filling a quota, have deliberately chosen a minority student with less over-all promise than De Funis even if it had wanted to, because the data available was not sufficiently precise to allow such judgments. Thus, it simply cannot be determined, and certainly not from this record, that De Funis was kept out of law school because of his race in the sense that unqualified minority applicants were admitted on the basis of *their* race.[17]

[17] The admission of unqualified minority students in order to obtain a fixed number, not the situation presented here, would indeed be of questionable constitutionality if it resulted in the exclusion of other qualified applicants.

Another aspect of the admissions policies of the Law School was its judgment that one factor in determining the qualities relevant to the contribution an applicant might make to the profession and the community, is whether there is a lack of lawyers serving the needs of minorities of which the applicant is a member. Certainly, a law school, in assessing its obligation to serve the needs of society, may decide that it will not use selection criteria that prevent minority groups from obtaining legal representation essential to the vindication of constitutional rights.[18]

In summary, the University of Washington acted consistently with its Fourteenth Amendment duty to ensure that black, Chicano, and American Indian applicants were not in fact denied equal access to law school because of factors relating directly to their race.[19] If the equal protection clause is ever to have practical meaning, it cannot be interpreted to prohibit such a program for: "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." *Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 98 (1945) (Frankfurter, J., concurring).

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[18] See, *NAACP* v. *Button*, 371 U.S. 415 (1963); *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

[19] An analogy can be drawn to the recognized power of Congress to adopt broad remedial legislation it feels necessary to ensure the effective enforcement of Fourteenth Amendment rights. See, *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); cf., *Welsh* v. *United States*, 398 U.S. 333, 371 (1970) (White, J., dissenting).

II.

The Minority Admissions Program Does Not Violate Title VI.

Finally, a comment should be made concerning the alternative ground advanced by De Funis, that § 601 of the Civil Rights Act of 1964[20] invalidates the method by which the Law School selected applicants.[21] We urge, to the contrary, that Title VI, in conjunction with the implementing regulations issued and interpreted by the Department of Health, Education, and Welfare, supports the School's actions. Recently, this Court upheld the power of HEW to issue appropriate regulations pursuant to § 601 in exercising its authority to dispense funds in aid of education. *Lau* v. *Nicholas*, —— U.S. ——, 42 U.S.L. Week 4165 (Jan. 21, 1974).[22]

The relevant regulations, found in 45 C.F.R. 80.3 (1973), are set out in the margin.[23] As noted in *Lau*, 80.3(b)(2)

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[20] 42 U.S.C. § 2000(d).

[21] Respondents have urged that this issue is not properly before the Court. However, in the event it is determined that the question has been properly raised, *amicus* wishes to bring to the Court's attention information pertinent to its consideration.

[22] *Lau* adhered to the general rule that deference would be given to the judgment of an administrative agency, as reflected in its regulations and their interpretation, as to the interpretation of a statute it is charged with enforcing. See, *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1973).

[23] 80.3(b)(2) A recipient, in determining the types of services financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subject-

prohibits the use of criteria or other methods of administration that have *the effect* of cutting persons off from programs because of their race. (42 U.S.L. Week at 4167.) More explicitly, 80.3(b)(6)(ii) allows a recipient that has not been guilty of deliberate discrimination to take affirmative action "to overcome the effect of conditions" that have limited participation by racial minorities.

This is precisely what the University of Washington Law School has done. Well aware of the small number of minority students, and with substantial reason to believe that this resulted because standardized criteria—doubtful predictors of success as students or lawyers—screened them out, the school took appropriate "action to overcome [these] effects."

The Department has construed Title VI, and the regulations, to permit precisely the kind of action taken by respondents. Thus, it approves of the use of differential and "non traditional" criteria for the admission of minority students, it recognizes the effect of generalized discrimina-

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ing individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color or national origin.

* * * *

(b) (6) (i) In administering programs regarding which the recipient has previously discriminated against persons on the ground of race, color or national origin the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin.

tion against minorities as justification, and distinguishes between "goals" and "quotas." [34]

CONCLUSION

The Legal Defense Fund urges that the foregoing analysis of the actual constitutional issue presented in this case requires that the decision of the Supreme Court of Washington be affirmed. Counsel for *amicus* would be remiss in their duty as officers of the Court, however, if they did not make known their belief that the proper disposition of this case may be to dismiss the writ as improvidently granted, since it is an inappropriate one for broad constitutional pronouncements concerning the validity of attempts to secure adequate minority representation. First, a decision by this Court one way or the other will in no way affect the rights of any of the petitioners, since Marco De Funis, Jr., will complete law school in June, 1974, regardless. Thus, the case is already effectively moot.[35] Second, it would be far more appropriate to address questions such as the validity of quotas, the admission of unqualified minority students in preference to qualified whites, and the exclusion of a white applicant because of the acceptance of minority ones, in a case that actually presented those issues, as this one does not.[36] Any decision

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[34] These interpretations are found in letters by or on behalf of the Director of the Office of Civil Rights of HEW, written in response to inquiries. A representative letter is set out in an appendix to this Brief, and we have deposited copies of other representative letters in the office of the Clerk.

[35] The action was not brought on behalf of any class, and no general relief, such as enjoining the future use of the challenged procedures, was either sought or granted.

[36] It would also be appropriate to wait for a case which properly raised in a fully-developed form the question of the applicability of Title VI of the Civil Rights Act of 1964 and the implementing regulations to these issues.

as to those questions here would be premature, because the present record simply says little or nothing about unforeseeable implications of new doctrine.

Respectfully submitted,

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APPENDIX

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

September 25, 1972

Honorable Donald C. Brotzman
House of Representatives
Washington, D.C. 20515

Dear Mr. Brotzman:

Thank you for your inquiry of August 16 on behalf of Mr. Kenneth Covell of Boulder, Colorado.

Mr. Covell is concerned about students he knows of with good grades and good examination scores who were not accepted to the University of Colorado's law and medical schools. Mr. Covell feels that the University rejected these students because the Department of Health, Education, and Welfare requires institutions of higher education receiving Federal funds to have a proportional representation of minority students in its enrollment.

As you know, the Office for Civil Rights administers Title VI of the Civil Rights Act of 1964, which requires that recipients of Federal financial assistance offer their benefits and services without regard to race, color, or national origin. Under Title VI institutions of higher education must recruit, admit and make all course offerings and college-supported activities available to students in a nondiscriminatory manner. However, no quota of minority students is required to comply with this law. The University of Colorado participates in various Federal financial assistance programs, and, therefore, is subject to the requirements of Title VI. In fall 1970 the University reported to

us that minority enrollment in its medical school was 3.2 percent. This is the latest data available to us at this time. While the University did not file a separate report for its law school, we are confident that minority enrollment in this school is of the same order of magnitude as that of the medical school.

This Office is aware that several institutions of higher education receiving Federal financial assistance have established programs to increase the number of minority group students they enroll. Such programs may include special efforts to recruit minority applicants, financial assistance and evaluation of applicants' potential through the use of non-traditional criteria. Quite often institution officials state a goal for a specified level of minority enrollment. In those cases that have come to our attention, goals differ from quotas in two main major respects. First, it is the objective of the goals to increase the participation of groups which have not been enrolled in significant numbers in the past. Second, the goals do not constitute a ceiling, i.e., no more than a specified number will be admitted. Clearly the intent of goals is the opposite of that of quotas, to include rather than limit.

In general the programs described above are consistent with the requirements of Title VI. Numerous court decisions have held that differential treatment on the basis of race is not a violation of the Constitution where its intent is to overcome the effects of past discrimination. Negroes, Spanish-surnamed Americans, and American Indians, as groups, have been subjected to various kinds of discrimination which have resulted in substantially diminished opportunities for them to derive the benefits of a higher education. It should be noted, however, that preferential ar-

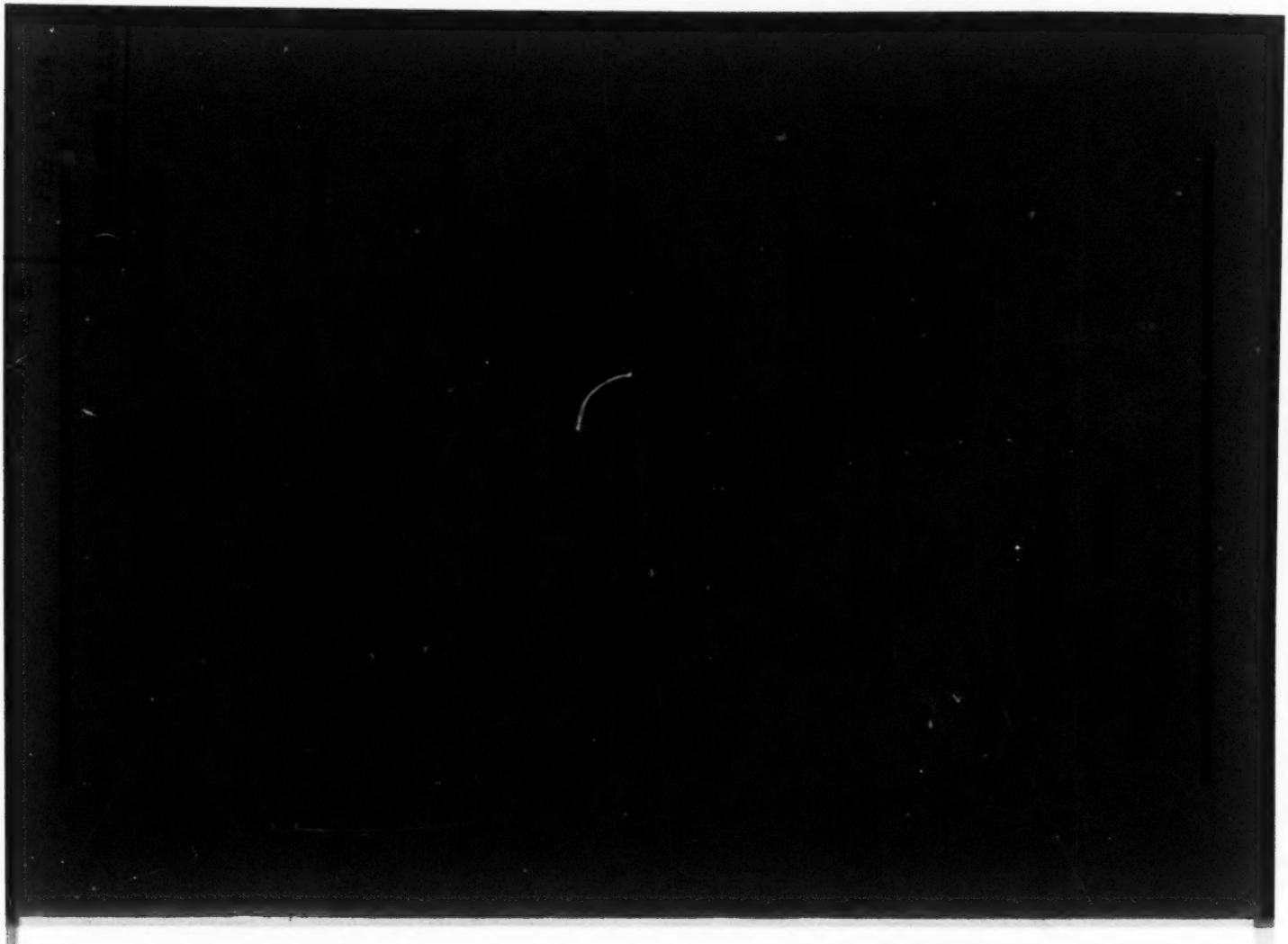
rangements for minority students cannot be established on a permanent basis. At some point, the appearance of minority group members in an institution's enrollment would be such as to require abandonment or suitable modification of the special programs.

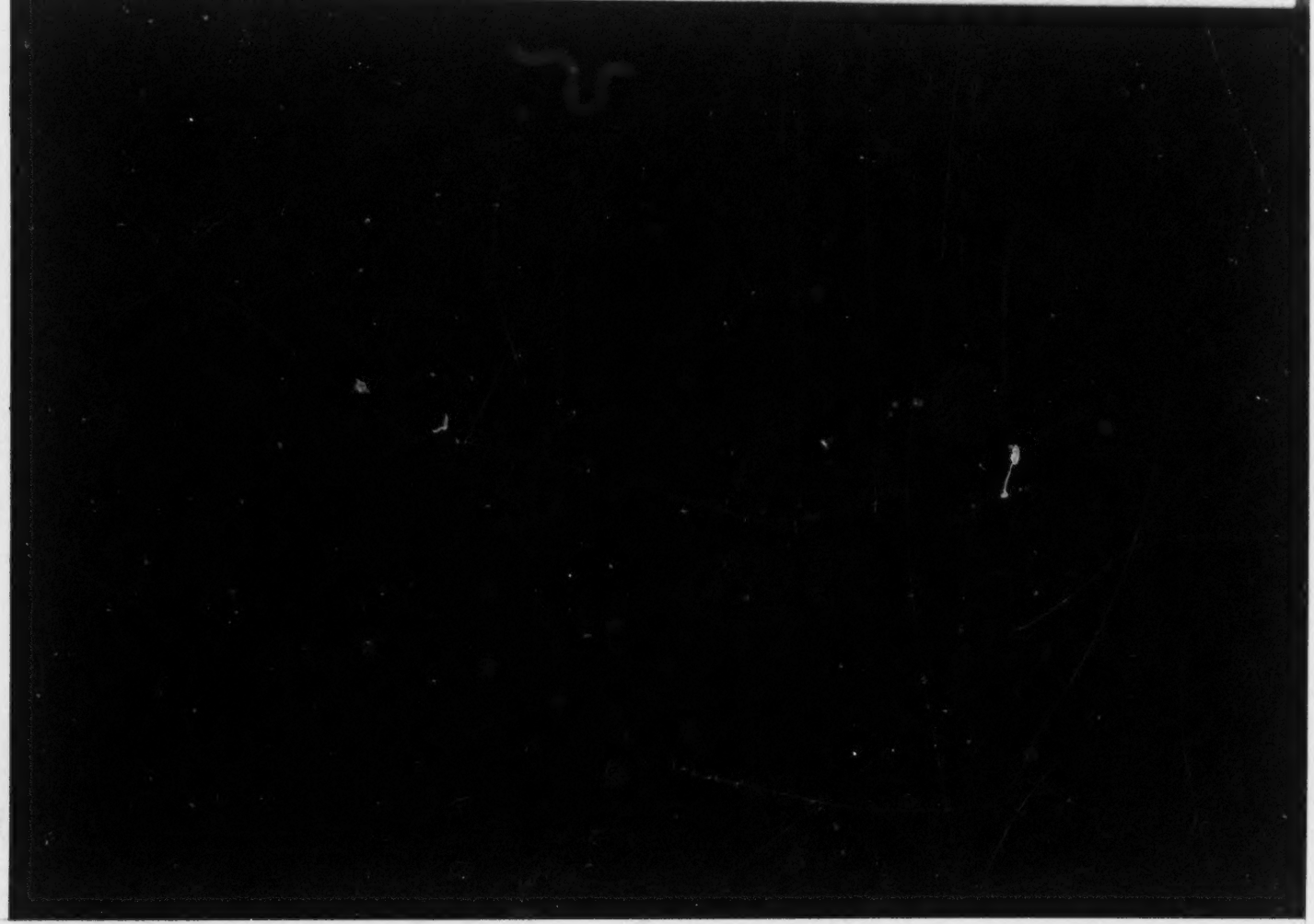
We appreciate your personal interest in this matter. If the Department can be of further assistance, please let me know.

Sincerely yours,

(Sgd.) Patricia A. King

J. Stanley Pottinger
Director, Office for Civil Rights





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In the

Supreme Court of the United States

October Term, 1973

No. 73-235

Marco DeFunis, *et al.*,

Petitioners,

—v.—

Charles Odegaard,
President of the University of Washington, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WASHINGTON

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND, INC., AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE*

CONSENT TO FILING

This Amicus Brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF AMICI

National Organization for Women Legal Defense and Education Fund, Inc. The NOW Legal Defense and Education Fund is the litigation and education affiliate of the National Organization for Women. NOW is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000 with over five hundred chapters throughout the United States. Many of its members are university women, faculty and students.

NOW has taken an early and active stand to seek equal admissions opportunities for women by means of affirmative action programs and the establishment of goals and timetables. At its last National Conference a strong policy was adopted opposing the attacks on these programs for women and minorities. The decision of this Court will have overwhelming impact on the redress of effects of past discrimination on university campuses and implications for other affirmative action programs. NOW's efforts and members will be significantly affected by the results of this case.

National Education Association. The NEA is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation, and has more than 1,300,000 members, including approximately 46,000 members employed in higher education.

NEA believes that our nation's educational institutions, at all levels, should reflect the diversity in our society, and that meaningful integration at higher levels of education

may require affirmative action programs in the admission of students to offset the effects of past discrimination. The decision of this Court will have a significant impact on the extent to which meaningful integration in the nation's institutions of higher education will be achieved in the years ahead.

QUESTION PRESENTED

Does the Fourteenth Amendment to the United States Constitution prohibit a State agency, the University of Washington Law School, from promoting meaningful integration of its student body and of the bar by allocating the limited number of spaces available in its first year class among the large number of qualified applicants in such a manner that members of certain minority groups which have historically been the victims of racial discrimination receive preferential consideration in the evaluation of their applications?[1]

[1] Petitioners have also presented to this Court a question under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). However, as Respondents have pointed out, this question was not raised in the trial court at all, was not passed upon by the Supreme Court of Washington, and is not properly before this Court. *Beck* v. *Washington*, 369 U.S. 541 (1962). Furthermore, the legislative history of the Civil Rights Act of 1964 is clear that the purpose of that Act was to protect minorities so that the statutory question is not different from that raised under the Fourteenth Amendment. See 2 U.S. Code Cong. & Admin. News 2355-409 (1964).

STATEMENT OF FACTS

The full factual background of the case and the opinions of the courts below are set out elsewhere. In brief, the facts are that Marco DeFunis, Jr., a white male, applied upon two successive occasions in 1970 and 1971 for admission as a first year law student at the University of Washington. The University of Washington Law School has a limited number of places and a large number of qualified applicants. Accordingly, the University places primary reliance upon a predicted first year average ("PFYA"), based upon junior and senior year college grades and scores upon the Law School Admissions Test ("LSAT"), in determining which of the qualified applicants shall be admitted and which shall not. The University admission standards have a certain amount of flexibility, but, in general, applicants with higher scores are preferred over those with lower ones.

In accordance with its efforts to increase the participation in the law school and bar of certain minorities which have historically been the victims of racial discrimination in this country (blacks, Chicanos, American Indians, and Filipino-Americans), the University gives a limited preference to qualified minority applicants. Thus, a number of such applicants are admitted with PFYA's lower than those which are required for nearly all "white" [2] applicants. DeFunis' application for admission was rejected upon both occasions because his PFYA was not high enough for admission on the scale applied to majority applicants, but a

[2] We use "white" here in view of the fact that Petitioners and their supporters have consistently used this term to refer to non-minority applicants, despite the fact that the minority group includes Chicanos and the non-minority group includes Chinese-Americans and Japanese-Americans.

number of minority applicants with lower PFYA's were admitted pursuant to the aforementioned affirmative action program. After his second rejection, DeFunis brought suit claiming that, since a number of minority applicants with lower PFYA's were admitted, his rejection was racially based and thus violative of the Equal Protection Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The issue in this case is whether the Fourteenth Amendment, designed as a shield to protect minorities, can be used as a sword by the white majority to prevent limited preferential treatment for these minorities where a State reasonably determines that such treatment is necessary to promote meaningful integration and to assure that full equality of status is made available to minorities.

The first Mr. Justice Harlan, it is observed, stated that "Our Constitution is color-blind." *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896) (dissenting opinion). However, Petitioners' attempt to utilize Justice Harlan's famous dissent to justify the result they seek in the present case ignores three centuries of American history critical to a proper analysis of the issue here.

The plain fact is that our Constitution has never been "color blind" in the sense used by Petitioners. It was not color blind upon its adoption in 1789 when it treated a black slave as three-fifths of a person and an untaxed Indian as no person at all. Art. I, § 2. It was not color blind in 1857 when Dred Scott was returned to slavery despite the Missouri Compromise. *Dred Scott* v. *Sandford,* 60 U.S. (19 How.) 393 (1857). It was not color blind in 1896 when the Court upheld, over Justice Harlan's objec-

tion, State laws requiring segregation of the races. *Plessy* v. *Ferguson, supra.* It was not color blind in 1950 when blacks were sent to jail for picketing to obtain equal employment rights. *Hughes* v. *Superior Court,* 339 U.S. 460 (1950). As a result, it cannot be color blind now.

It is true that the nation has made remarkable progress in attempting to integrate minorities into the mainstream of American society in the twenty years since this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). Furthermore, since *Brown* this Court has struck down a variety of sophisticated and not so sophisticated attempts to discriminate against blacks and other minorities, using broad language to the effect that racial classifications are constitutionally suspect. *E.g., Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964).

Nevertheless, no one could in good faith claim that that process is now completed, or that the effects of the discrimination allowed in this country for the 335 years preceding *Brown* have been eradicated. As a result, this Court has recognized that a neutral or color-blind policy—while of course desirable in the long run—is not neutral at all when established on a background of past discrimination. Rather, the impact of such a policy falls disproportionately on the minority groups which were the victims of past discrimination and fixes their members permanently in a subordinate status. *Lau* v. *Nichols,* 42 LW 4165 (decided January 21, 1974); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); *Hunter* v. *Erickson,* 393 U.S. 385 (1969).

The alternative, followed by the University of Washington here, is to provide through affirmative action the opportunity for the meaningful integration of minorities into all aspects of society. This may, indeed, mean preferences

for minority applicants in some areas. That is what the affirmative action programs adopted by the federal government in contracting under Executive Order 11246[3] and by various State agencies are all designed to accomplish. Despite their occasional protestations to the contrary, the position of Petitioners and their supporters would require this Court to strike down every governmental affirmative action program in the United States—because "affirmative action" means giving a preference to minorities.[4] That, in turn, will mean the end of meaningful governmental attempts to remedy the effects of past discrimination against racial minorities. No decision of this Court requires that result. On the contrary, virtually every court which has considered the matter has concluded that affirmative action of the sort at issue here is permissible, if not required. *Otero* v. *New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680 (7th Cir. 1972); *Offermann* v. *Nitkowski,* 378

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[3] 30 Fed. Reg. 12319 (1965), as amended, 32 Fed. Reg. 14303 (1967), 34 Fed. Reg. 12985 (1969).

[4] Petitioners and most of the Amici supporting them insist that this case involves "quotas." Their insistence on the use of that term might be read to suggest that they are not attacking affirmative action programs. However, it is clear that the present case involves "affirmative action"—a preference—and not "quotas." There is not one shred of evidence in this record that the University of Washington Law School was attempting to reach any fixed percentage of minority enrollment. Indeed, so far as it appears from the record, the University was pursuing a generalized program of seeking to increase its minority enrollment without paying particular attention to numbers. The University of Washington Law School admissions policy is thus an example of an affirmative action program. Indeed, one of the Amici in support of Petitioners, the AFL-CIO, has argued this case in terms of affirmative action and has forthrightly stated its desire to overturn all affirmative action programs. Interestingly, twenty-five years ago in *Hughes* v. *Superior Court, supra,* the CIO filed an amicus brief urging the opposite result. 339 U.S. at 461.

F.2d 22 (2d Cir. 1967). See also *McDaniel* v. *Barresi*, 402 U.S. 39 (1971).

The University of Washington concluded, after a long period of consideration and based upon its experience in law school admissions, that the only practical way to obtain any rapid and substantial increase in minority enrollment in its law school was to adopt the affirmative action program here at issue. That conclusion was eminently reasonable and the resulting affirmative action program is therefore permissible under the Fourteenth Amendment.

ARGUMENT

The University of Washington's Affirmative Action Program for Minority Applicants Is Entirely Proper Under the Fourteenth Amendment.

A. *Racial Classifications Which Protect Minorities Are Not Suspect Under the Fourteenth Amendment.*

1. Under This Court's Equal Protection Analysis, Only Racial Classifications Which Disadvantage Minorities Are Suspect.

The present case is the first to be presented to this Court in which a member of the white majority has contended that favorable treatment afforded members of previously abused minority groups violates the Fourteenth Amendment. Indeed, this case is placed in the proper perspective if it is kept in mind that not only do whites constitute a substantial majority of the population of the United States as a whole and the State of Washington in particular, but, even after the racial preferences utilized here, approximately 90% of the students in the University of Washington's Law School student body were white.

The case put by the Petitioners and the Amici who support them is simple:

> (1) The Fourteenth Amendment makes racial classifications impermissible.
>
> (2) Giving a benefit to a member of a minority group on racial grounds, where the amount of such benefits available is limited, results in the denial of the benefit so awarded to any white not so treated.
>
> (3) The denial of such benefit to whites constitutes discrimination based on an impermissible racial classification and is therefore unconstitutional.

Petitioners' case is ultimately a matter of semantics: preferential treatment of minorities equals unconstitutionally discriminatory treatment of whites.[5] Such a formulation is simplistic and incorrect.

For example, the granting of scholarships by the University of Washington to poor students has not generally been considered to violate the Fourteenth Amendment. Yet it is clear that

> (1) Classifications based on wealth are constitutionally impermissible. *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

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[5] Petitioners and the Amici supporting them seek to magnify the purported injury in this case by asserting that this case involves a "deprivation" of independent rights. But under the decisions of this Court, Mr. DeFunis has no independent constitutional "right" to go to the University of Washington Law School, or, for that matter, to any other school:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35 (1973).

(2) The University of Washington has a limited amount of scholarship funds available and affords preference to poorer students in awarding scholarships.

(3) A more well-to-do student is thereby denied a benefit—a scholarship—on grounds of wealth alone.

The point is that the extension of benefits to poor people without a corresponding distribution to the well-to-do is not discriminatory in the Constitutional sense* because giving scholarships to the poor merely secures for them benefits already available to the rich. On the other hand, it is evident that granting scholarships to the rich but not to the poor would be discriminatory, not to say irrational.

The foregoing analogy makes it clear that the fact that this Court has held on numerous occasions that classifications which discriminate against minorities on grounds of race are impermissible does not imply that favoring minorities is also impermissible. At the risk of appearing obvious, it must be emphasized that the Fourteenth Amendment was added to the Constitution to protect a powerless black minority against discriminatory treatment at the hands of

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* Some of the Amici supporting Petitioners suggest that preferences to "economically and culturally disadvantaged" students are not only allowable, but salutary, and that individual disadvantaged applicants (whether minority or white) may be given special treatment so long as race is not the basis for distinguishing among the persons so benefited. We would, of course, agree with the proposition that preferences could be given to the economically and culturally disadvantaged. And it is true that certain of the Respondents' witnesses attempted to justify the University's minority preferences on those grounds. But it does not follow, as Amici appear to assume, that such nonracial considerations are the only basis for constitutionally acceptable preferences. Of course, economic and cultural deprivation may well be one result of centuries of discriminatory treatment. But it is clear from the record that the purpose of the University of Washington's program was to overcome the effects of racial discrimination, not economic and cultural deprivation alone.

State governments and agencies controlled by the majority white population. Thus, this Court observed in *Buchanan* v. *Warley*, 245 U.S. 60 (1917):

> "It [the Fourteenth Amendment] was designed to assure to the colored race the enjoyment of all the civil rights that, under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation . . . ." 245 U.S. at 77.

Similarly, in *Palmer* v. *Thompson*, 403 U.S. 217 (1971), the Court stated:

> "[T]he Equal Protection Clause was principally designed to protect Negroes against discriminatory action by the States." 403 U.S. at 220.

See also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 420-44 (1968).

Indeed, for some years, this Court held that the Equal Protection Clause protected *only* blacks. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303 (1880). While the scope of the Fourteenth Amendment has been expanded since those cases, there is no doubt that the Amendment's primary function is to protect minorities. As this Court has recently stated, the Fourteenth Amendment recognizes that, where inequality exists in American society, that inequality "falls on the minority. The majority needs no protection against [such] discrimination . . . ." *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969). Thus, in speaking of discrimination against Chicanos, this Court has noted that:

> "Throughout our history, differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954).

For that reason, classifications have been held suspect only where they operate to the disadvantage of "a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). See also *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). For example, in rejecting a claim that classifications based upon school district wealth were suspect, this Court stated that such classifications

> "have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 28 (1973).

Thus a racial classification which disadvantages minorities is suspect; one which favors them is not. As the court recognized in *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968):

> "[C]lassification by race . . . is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which, usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed." 395 F.2d 931-32.

The regrettable fact is that there are not always enough positions in law school, jobs, government funds, or other

governmentally distributed or allocated benefits to go around. And whenever such a limited benefit is given to one person, it is denied to another. It is the position of these Amici that State and federal government agencies are entitled to grant a reasonable preference in the allocation of limited resources on the basis of race where that preference helps the very minorities specially protected by the Fourteenth Amendment. The United States Constitution cannot be read to characterize such action as invidious racial discrimination.

2. The Courts Have Consistently Allowed Racial Classifications Which Benefit Minorities.

We are aware of no case decided since *Brown* v. *Board of Education, supra,* by this Court or by any court of appeals, which has ever held that a racial classification which protects minorities or which promotes integration is suspect.[1] In fact, a number of courts of appeals have consid-

[1] Certain of the Amici supporting Petitioners imply that such preferences do not really favor minorities because the effect of any preference or affirmative action program is to "stigmatize" minorities, branding them "inferior." There is nothing in their suggestions, not to mention the record, which supports such a conclusion.

First, the minority preference given in an affirmative action program is not designed to treat minorities as inferior, nor does it have that effect. Rather, the preference involved simply provides additional benefits for minorities which benefits might otherwise be denied as a result of longstanding racial discrimination. *See* R. O'Neil, Preferential Admissions: Equalizing Access to Legal Education, 1970 U. Tol. L. Rev. 281.

Second, there is little indication that minorities themselves feel that affirmative action programs, which are, after all, designed to help them overcome the effects of prior discrimination, stigmatize them. For instance, in the present case, a large number of the organizations which have been in the forefront of the fight to protect minorities from the effects of discrimination favor affirmative action programs and are filing briefs in this case in support of the University of Washington. On the other hand, no organization the membership of which consists largely of members of the purportedly stigmatized minority groups has filed a brief on behalf of Peti-

ered State action, similar to that involved here, according a preference to minorities in an attempt to achieve full integration; one court of appeals has even considered a program which, in limited circumstances, gave a preference to whites in order to insure integration. In every single one of these cases, a racial classification has been upheld where its purpose was not to disadvantage minorities, but to promote integration.

For example, in *Associated General Contractors* v. *Altshuler*, —— F.2d ——, 6 CCH EPD ¶ 8993 (1st Cir. 1973), the court considered Massachusetts' affirmative action program setting "goals" and granting preferences to minority workers. The court rejected the contractors' contention that racial classifications are per se unconstitutional:

> "It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment [of blacks and other minorities] is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities." 6 CCH EPD at 6224.

Similarly, in *Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), the court held that pursuant to an act of Congress

> "Action must be taken [by state housing agencies] to fulfill, as much as possible, the goal of open, integrated

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tioners. These facts hardly suggest that such minority groups perceive the University's admissions program as stigmatizing. *See*, D. Bell, In Defense of Minority Admissions Programs: A Response to Professor Graglia, 119 U. Pa. L. Rev. 364 (1970).

> residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." 484 F.2d at 1134.

Thus, in *Otero* the court held that the New York City Housing Authority had an affirmative duty to promote integration in its housing projects, even though this meant assigning apartments on the basis of race and even though a preference had to be provided for white applicants in order to maintain the integrated nature of the project involved.

See also *TV-9, Inc.* v. *Federal Communications Commission*, —— F.2d ——, 28 P & F Radio Reg. 1115 (D.C. Cir. 1973) (FCC must treat minority ownership as a favorable factor in the awarding of broadcast licenses); *Southern Illinois Builders Ass'n* v. *Ogilvie*, 471 F.2d 680 (7th Cir. 1972), and *Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (affirmative action plans giving preference to minorities in construction trades constitutional); *Shannon* v. *U. S. Dept. of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970) (HUD must take race into account to assure integrated housing); *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971) (school board revision of promotion list in order to aid minority applicants constitutional); *Offermann* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967) (voluntary racial balance program to correct *de facto* school segregation may use racial classifications).

3. Voluntary Affirmative Action Programs Do Not Depend Upon a Finding of Specific Instances of Prior Discrimination.

Despite their arguments that racial classifications are per se invalid, Petitioners and their supporters are compelled to recognize that this Court has previously held that race *must* be taken into account in certain circumstances. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Green* v. *County School Board*, 391 U.S. 430 (1968). See also *United States* v. *Wood, Wire & Metal Lathers Int'l Union, Local No. 46*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); *Local 53, Int'l Ass'n of Heat & Frost Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969). Petitioners and their supporters, however, attempt to distinguish those cases on the ground that they involve the use of racial classifications as a remedy for specific instances of prior racial discrimination by the party being required to use a racial classification.[8] Indeed, Petitioners attempt to draw

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[8] Certain of the Amici contend that this Court's decisions have never sanctioned racial classifications or quotas which would operate to "disadvantage" any person. Thus, they claim that the school desegregation cases merely determine which children attend which school and do not result in the exclusion of any children from the school system. But they conveniently ignore the faculty aspects of the school desegregation cases. Thus, for example, in *United States* v. *Montgomery County Bd. of Educ.*, *supra*, this court required the hiring and assignment of teachers on a racial basis. Since the court order there required two black teachers for every twelve white teachers, it precluded the hiring of new white teachers in excess of that ratio. This, needless to say, imposed a "disadvantage" upon new aspiring white teachers not hired because of the requirement of the hiring of a certain number of black teachers. See also *Otero* v. *New York City Housing Authority*, *supra*; *Associated General Contractors* v. *Altshuler*, *supra*. In fact, any time a racial preference is imposed to assure that minorities are not victimized by past discrimination, there will be a "disadvantage" for those

from those cases the principle that race *cannot* be taken into account except in cases involving a prior court finding of State-imposed discrimination.

The basic flaw of Petitioners' analysis is that it fails to recognize the difference between what a State is *required* to do and what it is *permitted* to do. *Railway Mail Ass'n* v. *Corsi*, 326 U.S. 88 (1945). Compare *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972) (State not required to deny liquor license to private groups which discriminate against racial minorities), with *B. P. O. E. Lodge 2043* v. *Ingraham*, 297 A.2d 607 (Me. 1972), *appeal dismissed for want of substantial federal question*, 411 U.S. 924 (1973) (State may deny liquor license to private groups which discriminate against racial minorities). Even if *de facto* segregation and private discrimination, such as took place in the North, are not constitutionally prohibited, the Fourteenth Amendment clearly contemplates affirmative governmental efforts to eliminate such discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966). Compare *Keyes* v. *School District No. 1*, 413 U.S. 189, 217 (1973) (Mr. Justice Powell, concurring). Thus it simply does not follow that if the Fourteenth Amendment does not require a court to order the University of Washington to take race into account in its admissions policy, the Fourteenth Amendment therefore bars the University of Washington from doing so voluntarily.

As a matter of fact, no case in this Court, or in any court of appeals, has ever so held.[9] Indeed every appellate

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who will no longer have the benefit of discrimination against the disfavored group. But it has never been thought that discrimination must continue to exist for such a reason.

[9] *Hughes* v. *Superior Court*, *supra*, relied upon by Petitioners and a number of the Amici who support them is inapposite. In that case, the Court upheld the conviction for contempt of court of blacks who picketed to obtain hiring of black supermarket em-

court case which has considered the issue presently before the Court has concluded that a State may take race into account where it voluntarily chooses to adopt an affirmative action program designed to help minorities overcome the effects of societal discrimination, without regard to whether the State itself was the author of that discrimination. See, in addition to the cases cited at pages 14-15, *supra*, *Wanner* v. *County School Board*, 357 F.2d 452 (4th Cir. 1966); *Tometz* v. *Board of Education*, 39 Ill. 2d 593, 237 N.E.2d 498 (1968); *School Committee* v. *Board of Education*, 352 Mass. 693, 227 N.E.2d 729 (1967), *appeal dismissed*, 389 U.S. 572 (1968).

The contrary result urged on this Court by Petitioners is not only unsupported by authority but is illogical and would have pernicious results. If a State agency is not permitted to remedy the effects of racial discrimination through affirmative consideration of race unless it has itself been found guilty of *de jure* discrimination, it is then prohibited from attempting to provide a remedy for the effects of the general and widespread private discrimina-

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ployees in defiance of a State court injunction. In its opinion, the Court stated that there was a violation of the State's policy against all forms of discrimination in the attempt by the blacks to require a ghetto supermarket to hire a certain percentage of black employees and that the Due Process Clause of the Fourteenth Amendment did not bar California from enforcing that law. 339 U.S. at 462. Petitioners here rely upon *Hughes* for the proposition that the Equal Protection Clause of the Fourteenth Amendment bars the University of Washington from taking race into account in its admissions policy. However, *Hughes* was decided before *Brown* v. *Board of Education*, *supra*. Under the controlling decision then in effect, *Plessy* v. *Ferguson*, *supra*, the Equal Protection Clause allowed "separate but equal" and other such State action which this Court has long since held unconstitutional. Thus, the Court in *Hughes* did not even mention the Equal Protection Clause, let alone apply the sophisticated type of equal protection analysis the Court has developed more recently. Compare, *e.g.*, *Frontiero* v. *Richardson*, *supra*. Accordingly, it is submitted that *Hughes* furnishes no guidance on the equal protection issue raised by the present case.

tion which has pervaded American society for many years, for discrimination imposed by other States, or even for discrimination by other agencies of the same State. *But cf. Gaston County* v. *United States*, 395 U.S. 285 (1969).

Thus, for example, the University of Virginia would be permitted to grant a preference to minorities because it was at one time under legal compulsion to discriminate. It could then carry out a compensatory program to eliminate the disadvantages produced by its own past discrimination against minorities, as well as to eliminate the effects of past discrimination by others. The University of Washington, however, could not adopt such a program because there has been no finding by a court that it has been guilty of *de jure* discrimination.[10] Thus, it could not institute affirmative action programs to remedy the effects of the identical prior discriminatory treatment of minorities—because that discrimination was originally imposed by other States, such as Virginia, or by private parties, or by other agencies of the State of Washington. Such a result is illogical and unfairly penalizes minorities in States as to which there has been no finding of *de jure* discrimination.

Furthermore, under Petitioners' theory, all the cases upholding governmental attempts to remedy private discrimination in employment and housing by requiring racially based affirmative action programs would be reversed and governmental attempts to remedy such discrimination held unlawful. For example, since there has been no showing that every employer with a federal contract discrim-

[10] Of course, it may well be that the University of Washington's present admissions policy would be held unconstitutional in the absence of its affirmative action program because of its heavy reliance on the LSAT. Cf. *Griggs* v. *Duke Power Co., supra.* Furthermore, it may be that the State of Washington does have a history of racial discrimination, as the Opposition to the Petition for Certiorari in this case seems to indicate. Op., p. 18.

inates in employment, Executive Order 11246, which requires racially based affirmative action programs for Federal contractors,[11] would be unconstitutional. A similar fate would befall the 1968 Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, which requires the Secretary of Housing and Urban Development to consider race in order to promote integrated housing regardless of whether there has been a finding of prior discrimination. Every court which has been presented with such an argument has squarely rejected it. *E.g., Associated General Contractors* v. *Altshuler, supra; Southern Illinois Builders Ass'n* v. *Ogilvie, supra; Otero* v. *New York City Housing Authority, supra.* Cf. *Lau* v. *Nichols, supra.*

B. *The University of Washington's Affirmative Action Program for Minority Admissions Is Reasonable.*

In the preceding portions of this brief, Amici have demonstrated that (i) a classification based on race is neither per se unconstitutional nor suspect when it is utilized to benefit racial minorities previously victimized by discrimination and (ii) the utilization of race as a basis for remedial governmental action is not limited to cases involving court determinations of specific instances of prior

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[11] Ironically, it appears that the University of Washington, here under attack by Petitioners for its affirmative action program with respect to its student body, is being pressed by the federal government to establish an acceptable affirmative action program with respect to its employees:

> "The University of Washington faces the loss of millions of dollars of Federal funds unless it shows within 30 days that it has an acceptable program for employment of women and minorities. In a letter to Acting President Dr. Philip Cartwright, the U.S. Office for Civil Rights told the University that unless an acceptable affirmative action program is submitted by Jan. 11, the OCR 'will have no alternative but to conclude that the University is unable to comply with its obligations as a Federal contractor.'" Women Today, Vol. 3, No. 26, p. 5 (December 24, 1973).

invidious racial discrimination. Because the racial classifications under consideration here are not "suspect," the so-called "compelling state interest" standard of judicial review of State action challenged under the Equal Protection Clause is not applicable. Rather, the only remaining question is whether the action taken here by the University of Washington in according preferential treatment to minorities satisfies the general requirements of rationality or reasonableness laid down by the Fourteenth Amendment. *San Antonio Independent School District* v. *Rodriguez, supra; Jefferson* v. *Hackney,* 406 U.S. 535 (1972); *Dandridge* v. *Williams,* 397 U.S. 471 (1970).

To a great extent, both the validity of the University's goal and the rationality of the means used to achieve that goal have been demonstrated in the previous portions of this brief and need not be belabored here. In brief, the University's goal is to increase the integration of its law school and, thereby, ultimately to increase the participation of minority group members in the legal profession—as lawyers, judges, law teachers, etc.—both within and without the State of Washington. The validity of that goal is attested to by a long line of cases in this Court. *E.g., Brown* v. *Board of Education, supra; Sweatt* v. *Painter,* 339 U.S. 629 (1950); *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337 (1938).

The rationality of the means used by the University of Washington to achieve that goal is equally clear. As the record reveals, reliance by the University upon PFYA's in admitting applicants to its law school had previously resulted in only nominal attendance—one or two students per year—at the law school by members of the affected minority groups in prior years. It was thus evident that such reliance could not be continued if minority enrollment was to

be increased. At the same time, the University wished to continue to admit the best qualified applicants possible and regarded the PFYA as the best available means of measuring the relative qualifications of law school applicants. Accordingly, while no unqualified applicants were admitted, the University admitted some minority applicants with PFYA's lower than those of most whites.[12]

The University of Washington concluded, after a long period of consideration and based upon its experience in law school admissions, that the only practical way to obtain any rapid and substantial increase in minority enrollment in its law school was to adopt the affirmative action program here at issue.[13] The University was and is clearly entitled to decide, consistent with the spirit of the policies

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[12] As previously noted, the "whites" included Chinese-Americans and Japanese-Americans and the "minority" group included Chicanos. This fact further demonstrates the rationality of the University's policy, since it placed in the non-minority group those non-whites who had demonstrated an ability to obtain admission to the law school through the regular admissions process while placing some whites (Chicanos) in the minority category because the PFYA focus of the regular admissions process operated to deny them admission.

[13] It has been suggested by some Amici supporting Petitioners that a less onerous alternative would have been to continue to base admissions principally on PFYA's and to establish compensatory educational programs for minorities to enable them to increase their PFYA's and thereby obtain admission in the normal course. Other Amici contend, however, that such a program would suffer from the same constitutional infirmities as are alleged in the present preferential admissions policy. In any event, where—as here—the classification involved is not suspect, a State may adopt any rational or reasonable approach it prefers and need not choose the least restrictive alternative. See *San Antonio Independent School District* v. *Rodriguez, supra; Jefferson* v. *Hackney, supra.* And furthermore the fact remains that such a program would not have been a meaningful alternative because it would have taken far longer to result in any substantial increase of minority students.

established by this Court's decision in *Green* v. *County School Board, supra,* that what is required is meaningful integration now.

CONCLUSION

A color blind society in which race is given no consideration, in law or in practice, ought to be the goal of every American. But the plain fact is that neither our Constitution nor our society have been color blind to date, and long-standing pervasive racial discrimination has left its mark upon its victims. "Neutrality" in such circumstances is not neutral at all. Thus a preference which aids minorities—and there can be no doubt that the preference at issue here is just that—is perfectly consistent with the purpose of the Fourteenth Amendment. Petitioners and their supporters claim that preferences have "a history of subjugation" and that in some other case preferences may be used to discriminate against the minorities being benefited here. But the camel's nose in the tent argument by any other name is still the same. This Court, and other federal and State courts, are perfectly capable of distinguishing classifications which discriminate against minorities from those which aid them. The nation is committed to a policy of meaningful integration now, and it must remain so. Affirmative action programs such as that adopted by the University of Washington are one of the most effective,

and certainly an acceptable, means of making that policy work. The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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February 1, 1974

SUPREME COURT, U. S.
FEB 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 42(3), the Chamber of Commerce of the United States of America now moves the Court for leave to file the attached brief as amicus curiae in the above-entitled cause and shows:

1. Consent to the filing of a brief in this cause by the Chamber of Commerce of the United States of America, as amicus curiae, was obtained from Petitioners, but was refused by Charles Odegaard, Respondent herein.

2. The applicant, the Chamber of Commerce of the United States of America, has an interest in this case in that:

(a) The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

(b) In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in civil rights cases which focused on significant labor relations issues. *E.g.*, *Geduldig* v. *Aiello*, S.Ct. Docket No. 73-640, *cert. granted*, —— U.S. —— (1973); *Alexander* v. *Gardner-Denver Co.*, S. Ct. Docket No. 72-5847, *cert. granted*, 410 U.S. 925 (1973); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Dewey* v. *Reynolds Metal Co.*, 402 U.S. 689 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(c) The present case is of major importance to the Chamber's members because this Court's decision on the question whether state supported institutions of higher education may give special consideration to minority applicants in order to achieve a more representative student body will necessarily bear on employers' ability or duty to take "affirmative action" to increase their employment of "underrepresented" minorities. This is particularly so in view of the function served by the University of Washington Law School in the process of qualifying persons for employment in the legal profession.

Because American industry will be affected however this Court decides the present case, the Chamber considers it imperative that this Court be made aware of the various contexts in which employers may be called upon to consider race in order to avoid or eliminate discrimination.

3. The applicant believes that the following relevant facts, considerations, and questions of law have not been, and will not be, adequately presented by the parties:

(a) While employers may engage in "affirmative action" in part to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems, frequently such action is produced by a prudent response to one or more of the following factors:

(i) The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," 41 C.F.R. §§ 60-2.10, 2.12; *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), and the com-

mitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.

(ii) The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities, *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), *compare McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 805 n. 19 (1973); *Stone* v. *FCC*, 466 F.2d 316 (D.C. Cir. 1972); or a disproportionately high rejection rate for such groups, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) As the result of such considerations, many employers have now adopted "affirmative action" programs and are giving special consideration to race and ethnic background in their employment decisions. They are doing so on the advice of counsel that appellate courts have not yet significantly modified governmental demands or lower court orders that have found employment discrimination on the basis of gross underrepresentation of minority groups, and that require the employment of minorities in a certain ratio to overcome past discrimination. *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Employers engaging in affirmative action programs are of course aware —and concerned—that some of their actions may constitute discrimination in reverse, but they are also aware that in the reported judicial and admin-

istrative decisions, the majority group worker has to date seldom been upheld when he complains that affirmative action programs have violated his rights to equal opportunity. *Porcelli* v. *Titus*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); *DeFelice* v. *Philadelphia Board of Education*, 306 F. Supp. 1345 (E.D.Pa. 1969).

(c) The present case provides a timely opportunity for this Court to reassess developments in the law of equal protection and nondiscrimination as they affect the related problems of professional school admissions and employment. While a decision of this Court regarding the admissions policies of state educational institutions under the equal protection clause of the Fourteenth Amendment would not be controlling in subsequent cases involving Federal equal employment opportunity laws, it will of necessity be given considerable weight. That is, both courts and administrative agencies would follow the logic of a constitutional decision here, as the precedents in equal protection and discrimination cases have largely merged. Therefore, a decision in this case as to whether, and if so to what extent, race may be taken into account in selecting among applicants for professional schools will substantially control the answers to similar issues involving employment itself. Moreover, any attempt to limit such an effect by confining the Court's opinion to the facts of this case might well produce inconsistent lower court decisions in this troublesome constitutional area where the basic rights of minority and nonminority individuals must be reconciled.

4. In light of the substantial impact on American employers which the Court's decision in this case inevitably will have, and the complexity of the issues involved, the Chamber urges the Court to grant this Motion, not-

withstanding the delay incurred in the preparation of the brief amicus curiae. In addition, the grant of this motion will not result in any delay in the Court's consideration of the case, in that the brief contemplated by the motion will be filed in advance of the time in which Respondents' brief is required to be filed.

Wherefore, it is respectfully submitted that this Court should grant leave for the filing of the attached brief by the Chamber of Commerce of the United States of America, as amicus curiae, in this case.

Dated this 1st day of February, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; and HAROLD GARDINER, Registrar of the University of Washington,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE [1]

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* before this Court in civil rights cases which focused on significant labor relations issues. *E.g.*, *Geduldig* v. *Aiello*, S.Ct. Docket No. 73-640, *cert. granted*, —— U.S. —— (1973); *Alexander* v. *Gardner-Denver Co.*, S.Ct. Docket No. 72-5847, *cert. granted*, 410 U.S. 925 (1973); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Dewey* v. *Reynolds Metal Co.*, 402 U.S. 689 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

INTRODUCTION

A constitutional decision in the instant case will have far-reaching effect on American industry. Accordingly, the Chamber respectfully presents its views on the constitutional impact of a decision here on the employer-employee relationship. Whether state supported institutions of higher education may give special consideration to minority applicants in order to achieve a more representative student body will necessarily bear on employers'

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[1] A motion for leave to file this brief amicus curiae has been made to the Court pursuant to Supreme Court Rule 42(3).

ability or duty to take "affirmative action" to increase their employment of "underrepresented" minorities.[2] This is particularly so in view of the function served by the University of Washington Law School in the process of qualifying persons for employment in the legal profession.

Employers engage in "affirmative action" to make a personal contribution to resolving what is surely one of the nation's most compelling economic and social problems; however, such action may also reflect a prudent response to one or more of the following factors:

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[2] There can be no doubt that the development of equal employment opportunity law under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under Executive Order 11246 has been significantly affected by concepts first enunciated in equal protection cases involving education, voting, or other civil rights. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (citing Gaston County v. United States, 395 U.S. 285 (1969), re educational disadvantage and voting standards); Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (citing Porcelli v. Titus, 302 F. Supp. 726 (D.N.J. 1969), *aff'd*, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971), and Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), re the appropriateness of color conscious remedial action in public school employment and in public housing matters); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971) (citing Alabama v. United States, 304 F.2d 583 (5th Cir.), *aff'd mem.*, 371 U.S. 37 (1962), re the significance of statistical evidence showing that blacks had not served on juries in areas in which blacks constituted a substantial part of the population); Papermakers Local 189 v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (citing Louisiana v. United States, 380 U.S. 145 (1965), and other cases, re facially neutral standards in voting registration as perpetuating past discrimination).

Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (March 24, 1972), the need for consistency in the principles applicable to public and private employers is even more apparent. *See* Cleveland Bd. of Educ. v. LaFleur, —— U.S. ——, 42 U.S.L.W. 4186, 6 FEP Cases 1253, 1256 n.8 (January 21, 1974).

1. The requirement that Federal contractors commit themselves to "goals and timetables" for increasing their employment of minorities in those job categories in which they are being "underutilized," [3] and the commitments to hire and/or promote minorities according to a prescribed ratio which government agencies insist upon in order to resolve issues of employment discrimination.[4]

2. The burden of disproving discrimination which courts impose when presented with statistics showing a disproportionately low employment of minorities [5] or a disproportionately high rejection rate for such groups.[6]

Employers resisting pressure to be race conscious often face a massive if not insurmountable burden to justify their selection practices if they are seen as barriers to the employment of minorities, even though there is no basis for questioning his good faith.[7] Moreover, a failure to be race-conscious may give rise to litigation in which

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[3] 41 C.F.R. §§ 60-2.10, 2.12. *See also* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971).

[4] Seligman, *How "Equal Opportunity" Turned into Employment Quotas*, FORTUNE, March 1973, at 160, 161-62.

[5] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). *Compare* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973); Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972).

[6] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[7] ". . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) [emphasis in original].

preferential remedies are imposed,[8] and may disqualify an employer from Federal contract work.[9]

Accordingly, many employers have now adopted "affirmative action" programs and are giving special consideration to race and ethnic background in their employment decisions.[10] They are doing so on the advice of counsel that appellate courts have not yet significantly modified governmental demands or lower court orders that have found employment discrimination on the basis of underrepresentation of minority groups, and that require the employment of minorities in a certain ratio to overcome past discrimination.[11]

Employers engaging in affirmative action programs are of course aware—and concerned—that some of their actions may constitute discrimination in reverse, but they are also aware that in the reported judicial and administrative decisions, the majority group worker has to date seldom been upheld when he complains that affirmative action programs have violated his rights to equal opportunity.[12]

The efforts of Federal equal employment opportunity officials to provide guidance have been of limited value.

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[8] ". . . [W]hile quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973).

[9] 41 C.F.R. § 60-2.2; Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Edgely Air Products, Inc., HEW Docket No. CC-1, CCH Empl. Prac. Guide ¶ 2774.20 (March 23, 1971).

[10] Seligman, *supra*, note 5.

[11] *See* Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

[12] *See* Porcelli v. Titus, 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); DeFelice v. Philadelphia Bd. of Educ., 306 F.Supp. 1345 (E.D. Pa. 1969).

These have consisted largely of attempts to fashion a semantic distinction between demands for employment preferences founded upon lawful goals and those which are regarded as unlawful quotas. For example, as part of a joint policy statement issued by the Department of Justice, EEOC, the Civil Service Commission, and the Office of Federal Contract Compliance it was explained that:

> Any system which requires that consideration of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible. . . .
>
> A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job bracket. . . .
>
> * * * *
>
> While determinations of relative ability should be made to accord with required merit principles where there has been a history of unlawful discrimination, *an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group* from which to make the selection, and if the employer does not meet the goal, he has the obligation to justify his failure.[13]

While it is of some comfort to know that federal policy disapproves of efforts to force employers to prefer less

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[13] *Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices*, March 23, 1973, at 3-5. [Emphasis added.]

The critical issue presented by the emphasized language in this policy statement is its implication that "where there has been a history of unlawful discrimination"—however that is determined—an employer must prefer minimally qualified minority applicants over better qualified non-minority applicants in order to meet his "goals."

qualified applicants in the absence of a "history of unlawful discrimination," this does not provide meaningful assurance that the demands on employers for consideration of race will be restricted to those limited instances when it may be appropriate. Instead, compliance officials often assume past discrimination from the mere underrepresentation of minorities, subject qualification standards to unrealistically heavy challenges, and insist that employers hire and promote minorities in disproportionately large numbers to "catch up" for past deficiencies.[14]

The present case provides a timely opportunity for this Court to reassess developments in the law of equal protection and nondiscrimination as they affect the related problems of professional school admissions and employment. It presents a situation where racial considerations resulted in minority individuals being selected over the Petitioner, who rated higher on the basis of reasonable, and unchallenged, qualification standards. Moreover, while the action taken by the Respondents could not be justified on the basis of admitted past discrimination, it was clearly designed to help remedy the national underrepresentation of minority law students and lawyers.

While a decision of this Court regarding the admissions policies of state educational institutions under the equal protection clause of the Fourteenth Amendment would not be controlling in subsequent cases involving Federal equal employment opportunity laws, it will of

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[14] Malbin, *Employment Report/Agency Differences Persist Over Goals and Timetables in Nondiscrimination Plans*, NATIONAL JOURNAL REPORTS, Sept. 22, 1973, at 1400. This article also indicates that universities have been subject to similar pressures from officials dispensing Federal financial assistance to higher education as to faculty selection and student admission. *See also, Lau* v. *Nichols*, —— U.S. ——, 42 U.S.L.W. 4165 (January 21, 1974), holding that a school district's failure to rectify the English language deficiency of 1,800 students of Chinese ancestry violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, as interpreted by the administrative regulations promulgated thereunder, 45 C.F.R. Part 80.

necessity be given considerable weight. That is, both courts and administrative agencies would follow the logic of a constitutional decision here, as the precedents in equal protection and discrimination cases have largely merged.[15] This is exemplified by recent decisions judging the validity of selection standards, where the courts have required public and private employers to provide similar showings of job relatedness to justify the use of tests having a significantly disparate effect on minority applicants.[16] Therefore, a decision in this case as to whether, and if so to what extent, race may be taken into account in selecting among applicants for professional schools will substantially control the answers to similar issues involving employment itself. Moreover, any attempt to limit such an effect by confining the Court's opinion to the facts of this case might well produce inconsistent lower court decisions in this troublesome constitutional area where the basic rights of minority and non-minority individuals must be reconciled.

Accordingly, the Chamber urges that in deciding the claim of Marco DeFunis the Court consider the following issues:

1. May consideration of race in selections among qualified individuals ever be compelled?

2. May voluntary consideration of race in selections among qualified individuals ever be justified?

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[15] *See* note 2, *supra*, and the Preamble to OFCC's Proposed Revision of Sex Discrimination Guidelines, 41 C.F.R. Part 60-20, 38 Fed. Reg. 35336 (Dec. 27, 1973), in which OFCC indicated its recognition of the need for judicial guidance, particularly from this Court, in order to assure a reasonable degree of consistency in the enforcement of the various Federal equal employment opportunity laws.

[16] Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). It is worth noting that in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 808 n.14 (1973), this Court utilized cases arising under 42 U.S.C. § 1981 in assessing a claim under Title VII.

SUMMARY OF ARGUMENT

I. One should never be required to grant preferential consideration on the basis of race among qualified individuals except as part of a judicially approved remedy for past discrimination. Even in the limited context of a remedial order granting preferences based upon race, such a remedy should be considered appropriate only to the extent that it minimally restricts the opportunities of qualified non-minority applicants.

II. In the absence of a judicially approved remedy for past discrimination, one should not be required to grant preferential consideration to minorities, solely on the basis that they are statistically underrepresented. Nevertheless, so long as discrimination may constitutionally be presumed from the statistical underrepresentation of minorities, one should be able to consider race voluntarily in order to avoid such presumptions. Therefore, in making selections from among applicants whose relative qualifications cannot be differentiated on the basis of justifiable selection standards, it should be permissible to consider race in order to prevent the disproportionately low selection of members of identifiable racial groups.

ARGUMENT

As discussed above, employers and educators are constantly confronted with obligations to increase their workforce utilization of minorities. In some cases, this is the result of direct remedial orders of federal or state courts,[17] or State Fair Employment Practices commissions.[18] In others it is attributable to the efforts of fed-

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[17] *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[18] *E.g.*, Bay Shore Fire Dept. v. State Division of Human Rights, —— App. Div. 2d ——, —— N.Y.S. 2d ——, 5 FEP Cases 955 (App. Div. N.Y. 1973).

eral [19] or state [20] agencies regulating those who do business with or receive assistance from the government. Emphasis on increased minority utilization may well reflect self-imposed moral and social commitments and sound business and public relations objectives.[21] Indeed, the great bulk of American industry is moving in the direction of affirmative action voluntarily, and not as the result of compulsion (since most employers are not government contractors and have not been found guilty of past discrimination). What this group needs is guidance as to the constitutional propriety of their affirmative action activities.

In any of these contexts, there are essentially two levels of analysis for determining whether "preferences" are appropriate. The first encompasses those situations where the employer is ordered or "persuaded" [22] into granting a preference to members of identifiable racial groups. The second focuses on preferences which are granted voluntarily in an effort to reduce a current workforce disparity so that an employer will not be faced with judicial presumptions of discrimination or possible government contract ineligibility.[23]

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[19] *E.g.* Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d. Cir.), *cert. denied*, 404 U.S. 854 (1971).

[20] *E.g.*, Associated General Contractors v. Altshuler, —— F.2d ——, 6 FEP Cases 1013 (1st Cir. 1973).

[21] *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1117-18 (1971).

[22] Such persuasion often occurs in the context of EEOC efforts to resolve complaints of discrimination by "informal methods of conference, conciliation and persuasion" under Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), and in attempts to resolve pending litigation with other federal and state enforcement agencies.

[23] An analysis of selection preferences frequently raises questions about the devices used to measure applicant qualifications. However, in the instant case the selection or measurement standards

I. Preferences May Never Be Compelled Among Qualified Applicants on the Basis of Race Except as Part of a Judicially Approved Remedy for Past Discrimination.

Nothing in Federal law—constitutional or statutory—suggests the need or appropriateness of subordinating qualification standards to racial considerations in order to achieve equal opportunity except as part of a carefully devised judicial remedy for past discrimination. Indeed, in the landmark case of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court stated, in construing Title VII of the Civil Rights Act of 1964:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origin. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant.[24]

In *United States* v. *Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), for example, the court was faced with a set of facts in which the defendant employed eleven blacks during the relevant three year period, all of whom were assigned to jobs as porters. During the same period, the defendant hired sixty whites, all but three of whom were assigned to jobs of rank above that of porter.[25]

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used to define qualifications were not challenged as to their relevancy to the "employment" in question.

[24] 401 U.S. at 431. It has been held that while the specific restrictions of Section 703(j), 42 U.S.C. § 2000e-2(i), are not applicable to Executive Order 11246, actions under the Executive Order must conform to the prohibitions in Title VII against racial discrimination, however benign the purpose. Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* cases cited in note 2, *supra*, as to the interaction of equal protection and Title VII precedents.

[25] 451 F.2d at 444.

Nonetheless, the court found the weight of the evidence to indicate that the statistical imbalance did not result from racial discrimination, but rather from a demonstrable intent and practice of hiring the best qualified applicant for each job. The court thus concluded that no violation of Title VII had been proven, and that therefore no remedy was statutorily available:

> Although Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act, it certainly did not desire to melt job qualifications having no racially discriminatory ingredient or controlling pre-Act antecedent. In light of Title VII's legislative history, ascribing such an altruistic yet impractical purpose to that legislative body would surely be erroneous—"reverse discrimination" of the most blatant sort.[26]

Even when the question of preferences for minority applicants arises in the context of equally qualified minority and non-minority applicants,[27] the reminder seems

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[26] 451 F.2d at 445.

[27] A threshold definitional problem concerns the meaning of the term "equally qualified". Increasing attention is being given to the elusiveness of reliable and accurate merit rankings of job applicants, *e.g.*, Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 MINN. L. REV. 842, 856 (1972), and the consequent relevance and importance of additional subjective elements in the selection of employees from among a group of applicants at least minimally qualified in an objective sense. (But subjective evaluations of minority candidates by non-minority raters are themselves suspect, see Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), even where the employer's intent to provide equal opportunity is recognized.) In addition, while "the number of relevant qualities in which men may differ is so large that in real life employment situations, equality of job applicants is relatively rare," Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. L. REV. 363, 370-71 (1966), differences in test scores frequently may be immaterial because those differentials are so minor as to be indistinguishable from the point of view of predicting job success, or because

applicable that Federal law does not command a preference simply because of minority origin [28]—a result that may be considered to occur if decisions among qualified applicants include race as a controlling factor. However, in making selections employers often face a dilemna. If they continue color-blind hiring among equally qualified applicants and it results in a proportion of minority employees substantially below the percentage of minorities in the particular geographic area, or the ratio of minority applicants, they could be found ineligible for government contracts [29] and some courts would hold that a presumption of discrimination has been created which requires positive rebuttal.[30]

Without exception, the lower courts that have sanctioned mandatory preferences that dictate the admission or employment of minority individuals notwithstanding

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present-day testing techniques have a sufficiently large margin of error to preclude precise predictions. The EEOC Guidelines, 29 C.F.R. § 1607.5(c), for example, permit a 5% margin of error in statistical confidence, a level that itself has been said to be "a desirable goal and not a prerequisite to test validation." United States v. Georgia Power Co., 474 F.2d 906, 915 and n.11 (5th Cir. 1973). Moreover, a numerical ranking of applicants may not be possible due to the particular unquantifiable requirements of a specific job. Accordingly, "equally qualified" as used herein refers to applicants (1) whose objective qualifications are either approximately identical or whose differences have not reliable significance; or (2) whose relative qualifications cannot be adequately demonstrated.

[28] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). This requirement appears to be applicable to Executive Order 11246 as well. *See*, Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159, *cert. denied*, 404 U.S. 854 (1971).

[29] 41 C.F.R. § 60-2.2.

[30] *E.g.*, Carter v. Gallagher, 452 F.2d 315, 323 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972) (demographic disparity); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1352 (N.D. Cal. 1972) (pass rate disparity); Note, *Employment Discrimination: Statistics & Preferences Under Title VII*, 59 VA. L. REV. 463, 467-72 (1973).

better or equally qualified non-minority applicants, have done so on facts decidedly different from those presented in the instant case.[31] The principal distinguishing factor is that in each of those cases, the preference was created as part of a *judicial remedy* for what was found to have been past discrimination. Such a finding may result, for example, out of an overt discriminatory incident or practice,[32] or out of policies which, while not overtly discriminatory, result in total or near total exclusion.[33] In such a case, the courts have ruled that Section 703(j) of the Civil Rights Act of 1964 [34] does not prohibit the creation of a preferential hiring pool to fill a specified percentage of job vacancies that would include all qualified members of the group found to have been the target

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[31] *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 433 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969); United States v. Central Motor Lines, Inc., 338 F.Supp. 532 (W.D.N.C. 1971).

[32] *E.g.*, United States v. Central Motor Lines, Inc., 338 F.Supp. 532 (W.D.N.C. 1971).

[33] *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[34] 42 U.S.C. § 2000e-2(j) (1970):

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

of past discrimination,[35] regardless of whether particular individuals placed in that pool were the subjects of such discrimination.

In such cases the courts have generally provided that the remedial hiring ratios imposed are to be met as long as enough "qualified" minority applicants are available in the labor force. While the decisions do not concede that the orders will require the employment of less qualified applicants—and in some cases suggest the contrary[36] —such a result might be deemed to be sanctioned under most of these orders absent comment from the Court, because they direct that blacks be hired in a proportion substantially in excess of that which the minority population constitutes in the local labor force.[37]

Carter v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), provides a useful example of the operation of such reasoning. There, the district court found that the total absence of minority persons from the fire department of a large city with a minority population of 6.44% resulted from discriminatory hiring practices and procedures. The remedial plan adopted by the Eighth Circuit, *en banc*, rejected the concept of an absolute preference for qualified minority applicants, which, in the court's view, "would operate as a present infringement on those non-minority group per-

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[35] *E.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Porcelli v. Titus, 431 F.2d 1254 (3rd Cir. 1970), *cert. denied*, 402 U.S. 944 (1971); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

[36] *E.g.*, Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[37] In *Carter*, for example, the "one of every three" hiring ratio is grossly disproportionate to the minority percentage of the work force (6.44%). Similarly, in *United States* v. *Ironworkers Local 86*, 315 F.Supp. 1202, 1247 (D. Wash. 1970), *aff'd*, 433 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), in an area with a black population of 7 percent, various unions were ordered to "insure a minimum participation by blacks in the building trades' apprenticeship programs of 30 percent of each class, or 7 new apprentices . . . per year, which ever is greater."

sons who are equally or superiorly qualified for the fire fighter's positions." [38] It did, however, permit the use of a ratio whereby "one out of every theree persons hired by the Fire Department would be a minority individual who qualifies until at least 20 minority persons have been so hired." [39] The court's premise was that such relief was both necessary and reasonable "as a method of presently eliminating the effects of *past* racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination." [40]

Thus, the Court drew a distinction which the Chamber urges here, that in order to remedy past discrimination a court can require conduct which could not be constitutionally compelled absent judicial approval. As the *en banc* opinion in *Carter* makes clear, however, even by way of fashioning a judicial remedy, an absolute preference for a limited number of minorities was considered improper and the disproportionate preference established was not to remain in effect until minorities became a proportionate part of the employers' work force.[41]

The Chamber recognizes that circumstances sometimes exist in which past discrimination has been so pervasive and in which the validity of current qualification standards as applied to minorities is so much in doubt that the imposition of a remedial order designed to achieve a measure of proportional representation may be the most

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[38] 452 F.2d at 330.

[39] 452 F.2d at 331.

[40] 452 F.2d at 331 [Emphasis added].

[41] In *Carter* the ratio is to be removed when the minority participation in the employer's work force reaches approximately 50% of the minority percentage in the local labor force. See also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971) ("The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."); United States v. Household Finance Corp., 4 EPD ¶ 7680 (N.D. Ill. 1972).

appropriate means of eliminating discrimination in the short run. However, even with the limitations adopted by the Eighth Circuit in *Carter*, the effect such a remedy might produce on qualified non-minority persons causes the Chamber to believe that such remedies must be considered at the constitutionally questionable outer edge of permissible action to eradicate past discrimination. Certainly the use of mandatory and disproportionately high preferences should not be permitted in a case which lacks the stark facts of *Carter*, such as where a finding of discriminatory effect results from what amounts to an irrebuttable presumption of discrimination based on the imbalance in the employers' work force in comparison to the demographic breakdown of the population at large.[42] Such a situation would fall rather clearly within, and be prohibited by, the principle that "while quotes merely to obtain racial balance are forbidden, quotas to correct past discriminatory practices are not."[43] Where no specific finding of discrimination has been made, the imposition of a preference in the form of "goals" or quotas, even on government contractors,[44] to correct "underutilization" of minorities would be questionable in the absence of judicial approval; where the facts prove no more

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[42] Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970). *See also* Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). This Court's language in *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 805 n.19 (1973), however, indicates a more tempered view of presumptions arising from statistical data, as does the recent decision in *Cleveland Bd. of Educ.* v. *LaFleur*, —— U.S. ——, 41 U.S.L.W. 4186, 6 FEP Cases 1253 (January 21, 1974), in which this Court indicated its disapproval of irrebuttable presumptions. Cf. Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972) (minority work force of 8% in a geographic area with a 25% minority population is within the "zone of reasonableness" and therefore does not create a prima facie case of discrimination).

[43] United States v. Wood, Wire & Metal Lathers Local 46, 471 F.2d 408, 413 (2d Cir. 1973).

[44] As required by 41 C.F.R. § 60-2.

than statistical underutilization such relief represents a constitutionally forbidden quota or preference merely to obtain racial balance.

The Chamber respectfully requests this Court to clarify the circumstances under which a remedy like that in *Carter* may be appropriate to correct past discrimination or to assure future non-discrimination.[45] Moreover, the limits that should be observed in framing such orders also needs elucidation, e.g., at what point does the employment ratio ordered become so disproportionate that its impact on non-minorities become excessive? At what point does minority employment become sufficient to call for removal or restriction of the disproportionate preference?

What the decisions in *Carter* and similar cases fail to acknowledge is that preferential consideration of race for employment purposes is not necessarily supported by the equal protection or Title VII precedents of this Court. Although the Court has approved of consideration being given to race in formulating remedies for discrimination in certain contexts,[46] it is also clear that the cases which have directed such corrective action to be taken *would not deprive any non-minority persons of access to the right or resources in question*, but merely comprised a reorganization of the manner or degree of utilization of the right to be protected—as in rearranging school assignments for students or faculty in formerly segregated school systems.[47]

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[45] Merely finding that the Respondents have engaged in constitutionally forbidden conduct could well result in continued approval of *Carter*-type remedies by courts in circumstances in which they are appropriate.

[46] *See, e.g.*, McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[47] McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

While an analysis of the permissible bounds for preferential *remedial* action would clarify the continuing obligations of educators or employers, the present case represents a clear example of impermissible action. In the case at bar, the Respondents have instituted a preference in favor of minority individuals in the absence of any judicially approved resolution of complaints of past discrimination at the University of Washington Law School. To the contrary, all that can be pointed to in support of the preference is a vague notion of "historical underrepresentation" in the legal profession. Clearly that does not present even an adequate "rational basis" for such affirmative action.[48] Whatever the intention behind such action, the preference of a lesser qualified individual over a better qualified person on the basis of race under these circumstances runs counter to the Fourteenth Amendment.

II. Race May Be Given Limited Consideration In Voluntary Efforts to Improve the Employment Opportunities of Underrepresented Groups.

As indicated above, consideration of race in choosing among qualified applicants should not be compelled in the absence of a prior judicial finding of discrimination.[49] However, employers and others engaged in selecting applicants must be *allowed* to take race into account to the extent necessary to avoid having presumptions of racial discrimination erected against them. Such presumptions of discrimination have been made by courts where mi-

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[48] *See* Cleveland Bd. of Educ. v. LaFleur, —— U.S. ——, 42 U.S. L.W. 4186, 6 FEP Cases 1253 (Jan. 21. 1974).

[49] More specifically, the Chamber submits that the regulations issued under Executive Order 11246 requiring that contractors commit themselves in the absence of findings of discrimination to increasing their employment of minorities in categories when they are underutilized, 41 C.F.R. § 60-2, are inconsistent with the Fifth Amendment obligations of the Federal Government to the extent they limit the employment opportunities of non-minority individuals.

norities were not a substantially proportionate part of the employer's work force when compared to the racial composition of apparently qualified applicants [50] or of the local area.[51] Whether, and to what extent, these presumptions were properly made are some of the questions the Chamber asks this Court to evaluate in considering the instant case.[52]

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[50] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[51] See cases cited note 5, *supra*.

[52] Presumptions of discrimination based on statistical disparities—and the race consciousness they compel—should also be examined by this Court in terms of its declaration in *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225, 236 (1969), that not even public school faculties need be racially balanced. Apparantly Congress had the same view before it adopted the nonpreference provision of Section 703(j). As stated in an interpretative memorandum presented by Senators Clark and Case, the Senate floor managers of Title VII:

> There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.
>
> *While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.* 110 Cong. Rec. 7213 (April 8, 1964) [Emphasis added].

In the Chamber's opinion it should be recognized that to the extent that statistical underutilization creates a presumption of racial discrimination, defensive racial consciousness by employers is inevitable and will at times adversely affect the opportunities of nonminorities. Perhaps the best way to minimize such impact is for the Court to provide further guidance to lower courts in the circumstances under which a disparity is not sufficient to warrant a presumption of discrimination. Cf. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 805 n.19 (1973); Stone v. FCC, 466 F.2d 316 (D.C. Cir. 1972); United States v. Chesterfield County School District, —— F.2d ——, 6 FEP Cases 447 (4th Cir. 1973), at n.5.

Clearly, to the extent employers must answer for such disparities and do not have validation for their selection devices which will withstand judicial scrutiny,[53] they must be permitted to take steps to assure that the disparity does not continue in new selections.

In addition, there are a range of other actions which employers or educators should be able to undertake voluntarily to increase the opportunities of minorities. These would include special recruiting activities to generate an increased flow of minority applicants for merit consideration, or the development of training or remedial education programs aimed at increasing the ability of previously disadvantaged persons to compete on an equal basis with other applicants. The key factor which distinguishes these efforts from impermissible hiring or admission preferences is that while these programs would confer a differential benefit on minorities as a class, they would not require selecting lesser or equally qualified minorities on the basis of race, at the expense of competing non-minority applicants. In essence, they would constitute preparation for realistic competition on the basis of job-related qualifications.

What the Chamber urges, then, is that the Court consider the effects that its ruling in this case inevitably will have on subsequent interpretations of the duties and permissible acts of both educational institutions and employers.

In the Chamber's view, the Court should reject the notion that a public institution, or a private employer, can be compelled to give preference to a lesser or equally qualified minority applicant over a non-minority appli-

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[53] *E.g.* United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973).

cant solely because of their respective races, except where the class of which the minority is a member was the target of an identifiable discriminatory policy or practice, where there has been judicial finding to that effect, and where a short-term preference is necessary to correct the substantial exclusion of that minority group and will not be a bar to non-minority applicants.

It should be impermissible to require an institution or employer to give consideration to race in selecting from qualified applicants where there has been no judicially approved finding of or remedy for discrimination. However, so long as it is constitutionally proper for courts to create a presumption of discrimination from evidence of statistical disparity in the selection of minority applicants, voluntary consideration of race should be permitted to the extent necessary to avoid continued disparities in selections from among those whose relative qualifications cannot be differentiated on the basis of justifiable selection standards. In addition, there must be a range of permissible recruiting and remedial education or training activity which enables educators and employers to take steps to increase the availability and ultimate utilization of qualified minority individuals in schools and jobs.

CONCLUSION

Transposing these considerations to the case before the Court, the Chamber submits that the decision of the Supreme Court of Washington should be reversed. Respondents have voluntarily decided to institute a preference in favor of lesser-qualified individuals where there has been no finding of past discrimination and where indeed the evidence appears to indicate the contrary.[54] Affirmance on these facts would preface a major retreat from fundamental concepts of equal protection, non-discrimination and individual merit.

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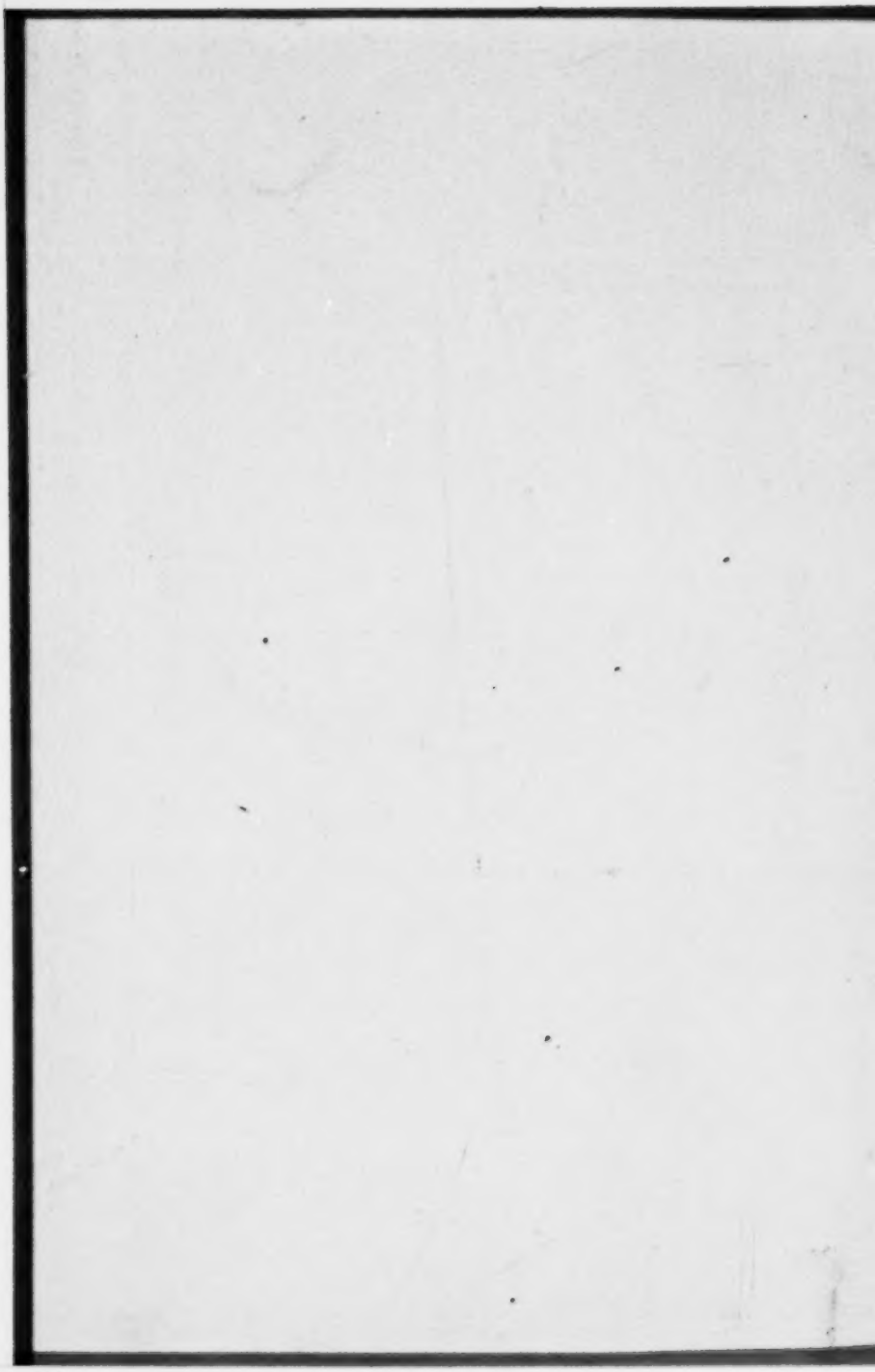
[54] Compare, *e.g.*, Defendant's Exhibit 7 (1969-70 minority enrollment at University of Washington Law School was approximately 2.2 percent [8 of 356]); *with* 1970 census figures for the State of Washington (black population of 2.1 percent).



SUPREME COURT OF THE UNITED STATES

FEB 2 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

No. 73-235

Marco DeFunis and Betty DeFunis, his wife;
Marco DeFunis, Jr. and Lucia DeFunis, his wife;

Petitioners,

v.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington.

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF
THE STATE OF WASHINGTON

BRIEF OF THE DEANS OF THE ANTIOCH SCHOOL OF LAW AS AMICI CURIAE

Submitted by:
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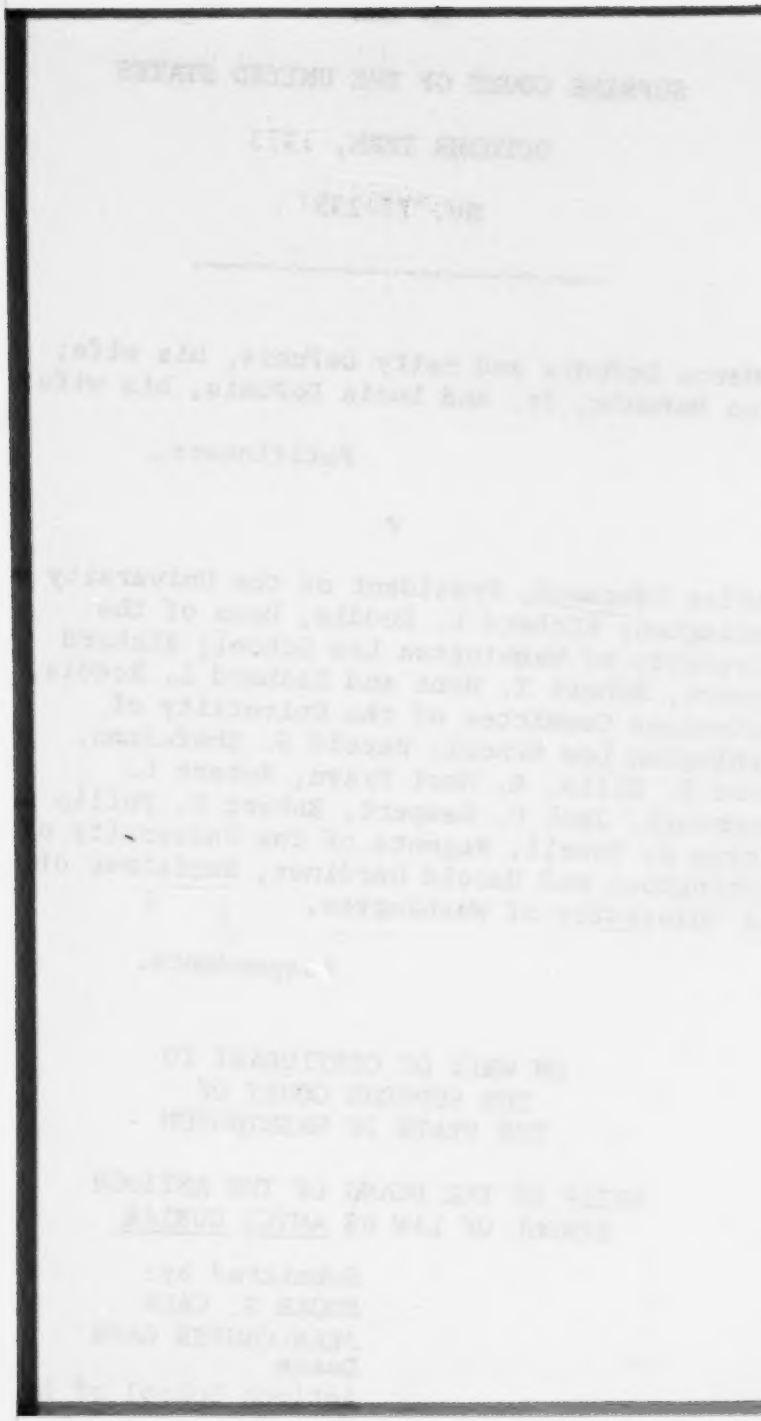

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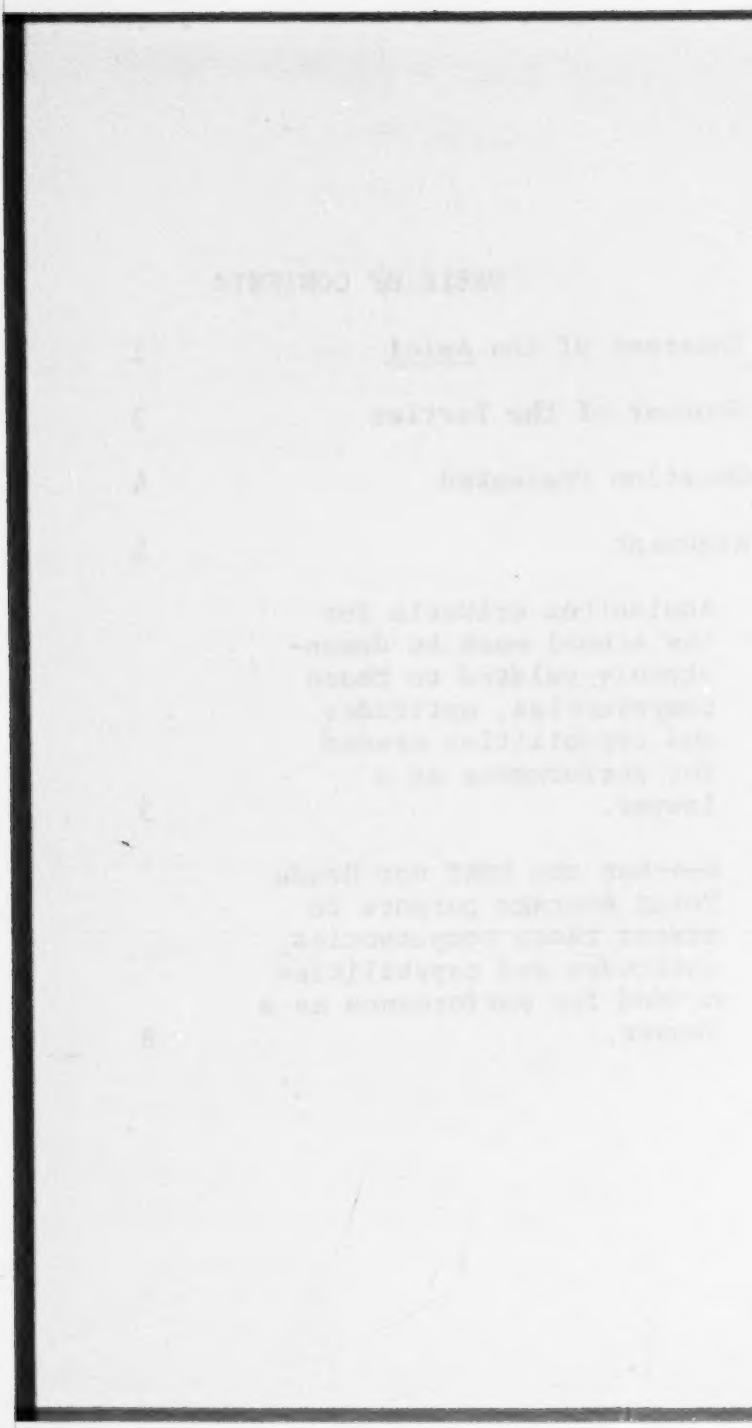
Admissions criteria for law school must be demonstrably related to those competencies, aptitudes and capabilities needed for performance as a lawyer. 5

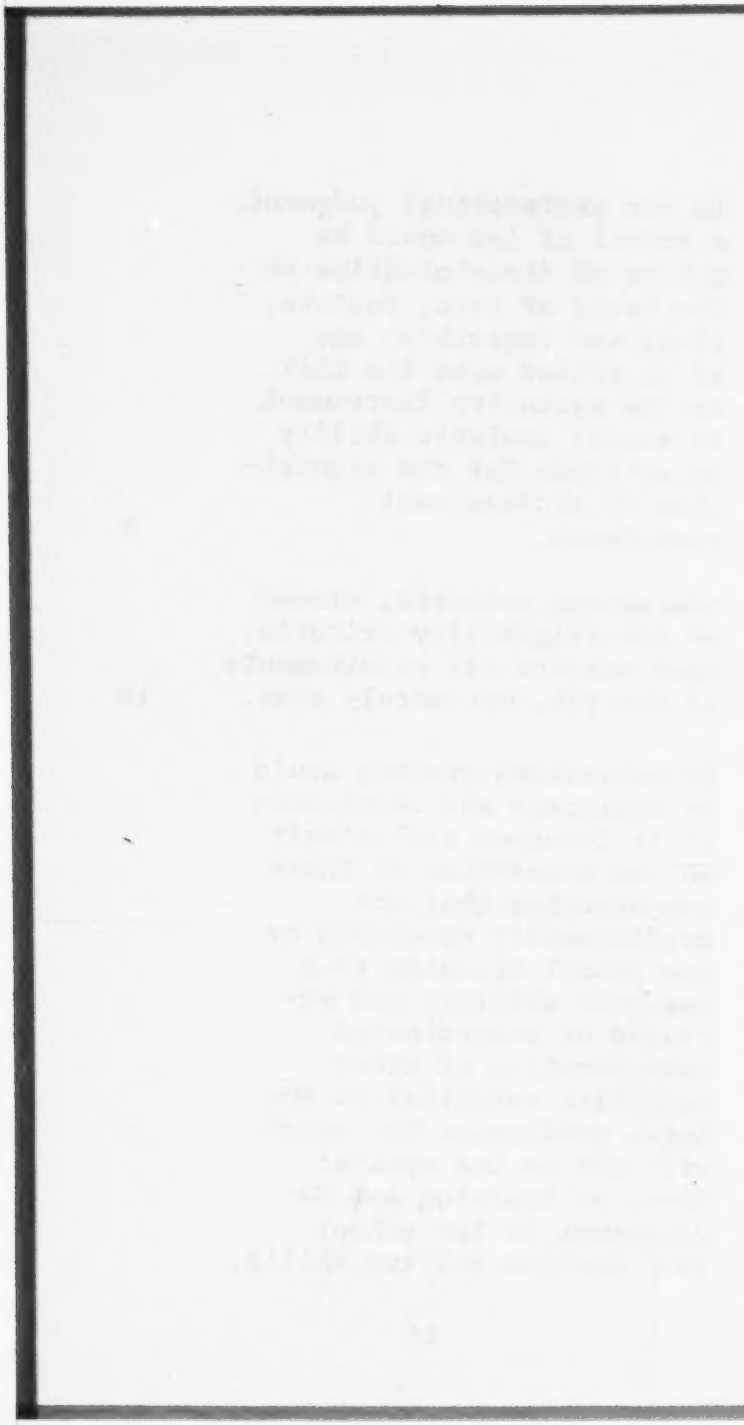
Neither the LSAT nor Grade Point Average purport to assess those competencies, aptitudes and capabilities needed for performance as a lawyer. 8



In our professional judgment, a school of law would be guilty of discrimination on the basis of race, culture, class and (possibly) age if it relied upon the LSAT as the exclusive instrument to assess analytic ability or aptitude for the acquisition of professional competence. 9

Admissions criteria, viewed as job eligibility criteria, must measure all requirements of the job, not merely some. 14

An admissions process would be arbitrary and capricious if it focusses exclusively on the possession of those competencies that are traditionally developed by law school training (e.g. analytic ability) and excluded or subordinated consideration of other qualities essential to the legal profession but which will not be the special focus of training and development in law school (e.g. problem solving skills,

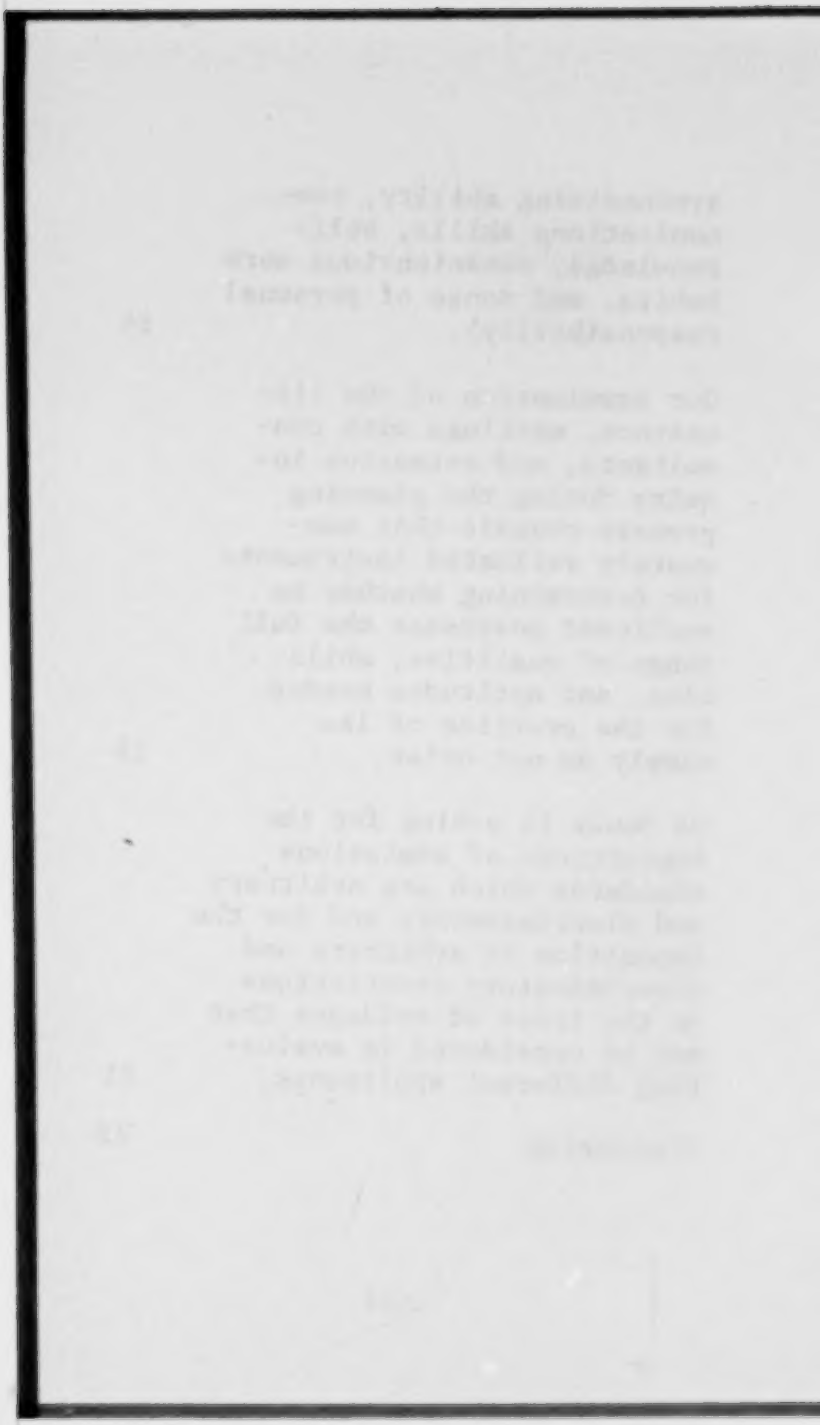


synthesizing ability, communications skills, self-knowledge, conscientious work habits, and sense of personal responsibility). 16

Our examination of the literature, meetings with consultants, and extensive inquiry during the planning process reveals that adequately validated instruments for determining whether an applicant possesses the full range of qualities, abilities, and aptitudes needed for the practice of law simply do not exist. 18

De Funis is asking for the impositions of admissions standards which are arbitrary and discriminatory and for the imposition of arbitrary and discriminatory restrictions on the types of evidence that may be considered in evaluating different applicants. 21

Conclusion 22

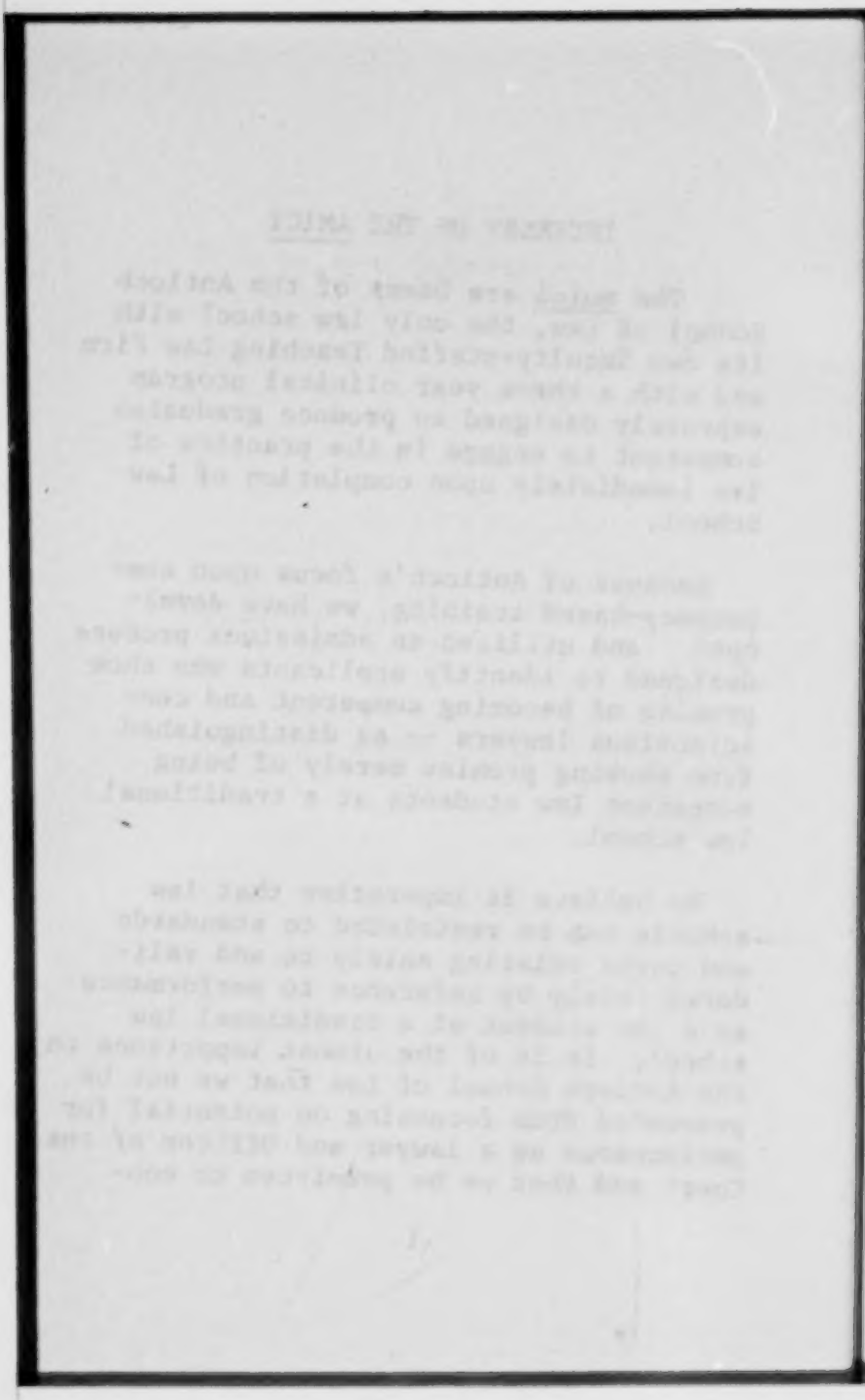


INTEREST OF THE AMICI

The amici are Deans of the Antioch School of Law, the only law school with its own faculty-staffed Teaching Law Firm and with a three year clinical program expressly designed to produce graduates competent to engage in the practice of law immediately upon completion of Law School.

Because of Antioch's focus upon competency-based training, we have developed and utilized an admissions process designed to identify applicants who show promise of becoming competent and conscientious lawyers -- as distinguished from showing promise merely of being competent law students at a traditional law school.

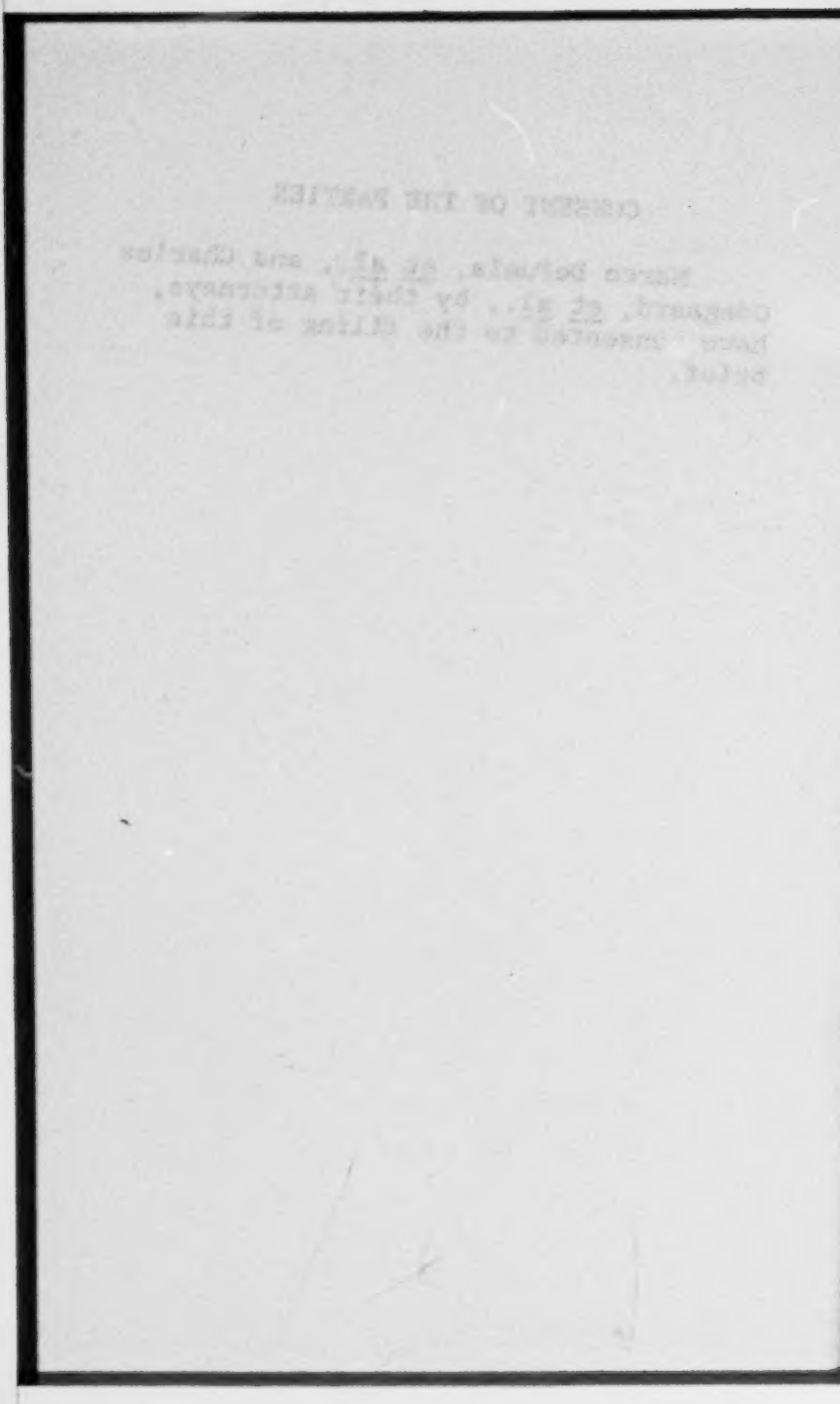
We believe it imperative that law schools not be restricted to standards and tests relating solely to and validated solely by reference to performance as a law student at a traditional law school. It is of the utmost importance to the Antioch School of Law that we not be prevented from focussing on potential for performance as a lawyer and Officer of the Court and that we be permitted to con-



tinue to consider different types of evidence in assessing the potential competence of different applicants.

CONSENT OF THE PARTIES

Marco DeFunis, et al., and Charles Odegaard, et al., by their attorneys, have consented to the filing of this brief.



QUESTION PRESENTED

Does a state supported school of law violate the Equal Protection Clause of the Fourteenth Amendment when its admission procedure provides that an applicant's racial or ethnic background may trigger the consideration of additional categories of evidence to assess potential competence as a student and potential contribution to the legal profession?

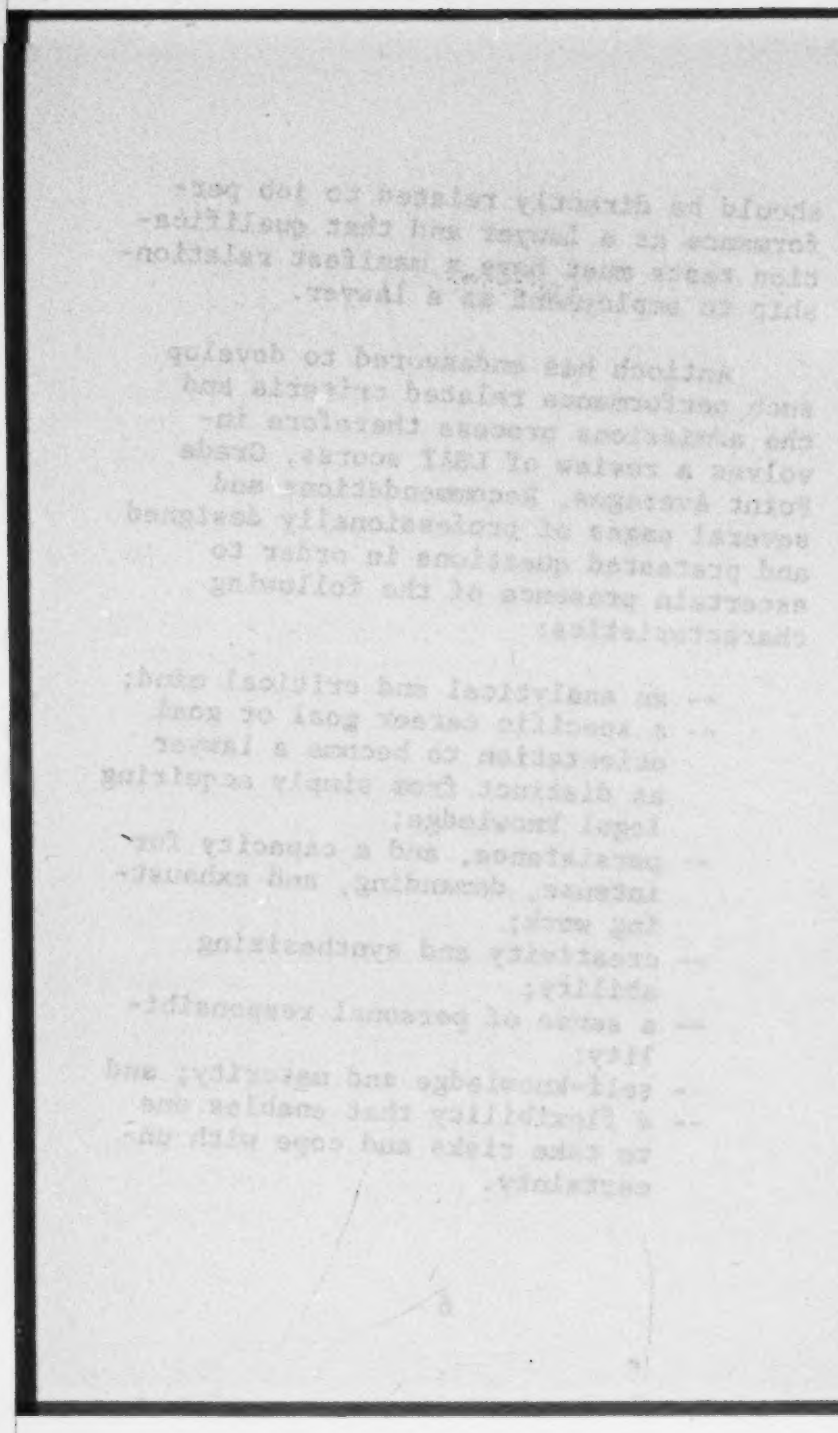
Admissions criteria for law school must be demonstrably related to those competencies, aptitudes and capabilities needed for performance as a lawyer.

A school of law is not solely a graduate school in law. It is a professional school responsible for training students who wish to enter the legal profession. Admission to an accredited law school is a prerequisite of admission to the bar in almost every state. The admissions process in fact constitutes a determination of eligibility to engage in the practice of law. Accordingly, admissions standards and procedures for entry into law school should be directly related to job performance, not solely as a graduate student in law but also as a potential lawyer and Officer of the Court. This view of the student as more than a graduate student in law is evidenced by the student practice rules or statutes adopted in over thirty-nine states. Accordingly, we interpret the principles laid down in Griggs v. Duke Power Co., 401 U.S. 424 (1971) as directly applicable to both the criteria and tests used in the process of law school admissions. We interpret that case as standing for the general propositions that educational or other requirements

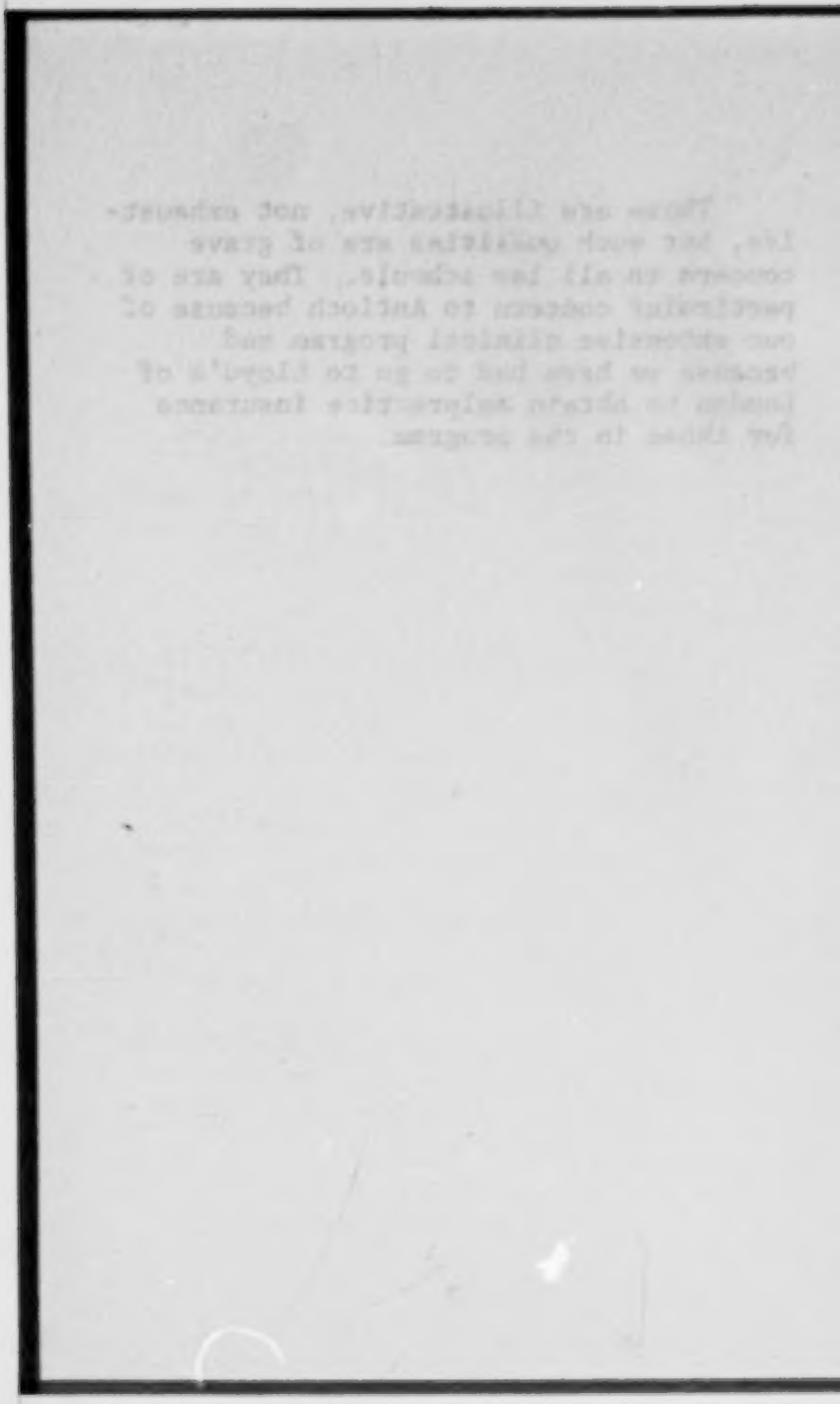
should be directly related to job performance as a lawyer and that qualification tests must have a manifest relationship to employment as a lawyer.

Antioch has endeavored to develop such performance related criteria and the admissions process therefore involves a review of LSAT scores, Grade Point Averages, Recommendations and several pages of professionally designed and pretested questions in order to ascertain presence of the following characteristics:

-- an analytical and critical mind;
-- a specific career goal or goal orientation to become a lawyer as distinct from simply acquiring legal knowledge;
-- persistence, and a capacity for intense, demanding, and exhausting work;
-- creativity and synthesizing ability;
-- a sense of personal responsibility;
-- self-knowledge and maturity; and
-- a flexibility that enables one to take risks and cope with uncertainty.



These are illustrative, not exhaustive, but such qualities are of grave concern to all law schools. They are of particular concern to Antioch because of our extensive clinical program and because we have had to go to Lloyd's of London to obtain malpractice insurance for those in the program.

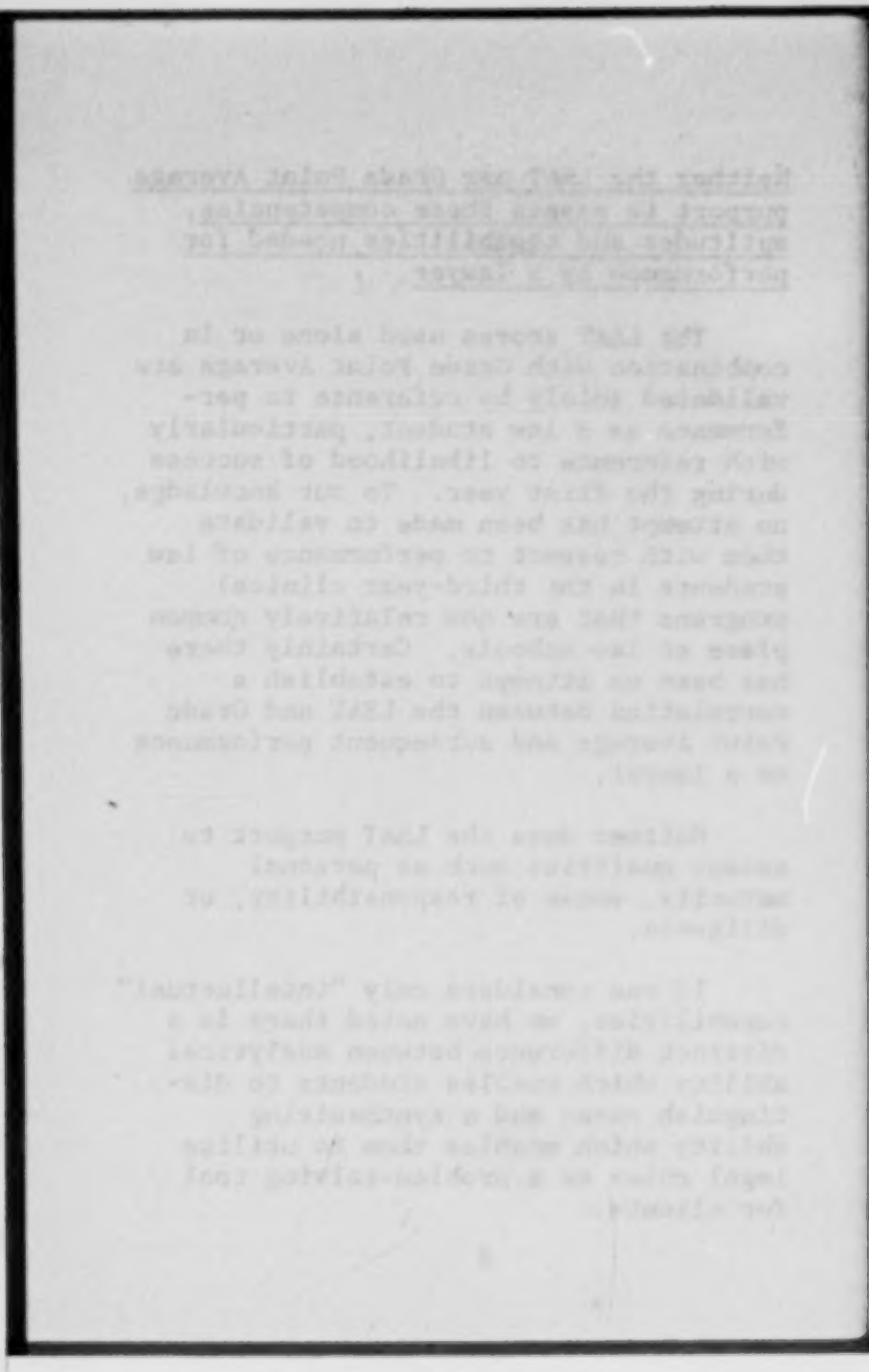


Neither the LSAT nor Grade Point Average purport to assess t.ose competencies, aptitudes and capabilities needed for performance as a lawyer.

The LSAT scores used alone or in combination with Grade Point Average are validated solely by reference to performance as a law student, particularly with reference to likelihood of success during the first year. To our knowledge, no attempt has been made to validate them with respect to performance of law students in the third-year clinical programs that are now relatively common place at law schools. Certainly there has been no attempt to establish a correlation between the LSAT and Grade Point Average and subsequent performance as a lawyer.

Neither does the LSAT purport to assess qualities such as personal maturity, sense of responsibility, or diligence.

If one considers only "intellectual" capabilities, we have noted there is a distinct difference between analytical ability which enables students to distinguish cases and a synthesizing ability which enables them to utilize legal rules as a problem-solving tool for clients.



In our professional judgment, a school of law would be guilty of discrimination on the basis of race, culture, class and (possibly) age if it relied upon the LSAT as the exclusive instrument to assess analytic ability or aptitude for the acquisition of professional competence.

We cannot rely upon the LSAT score as the single most valid indicator of potential ability to master legal concepts and legal analysis for two principle reasons:

1. The LSAT at best predicts ability to acquire legal concepts through one and only one pedagogic method -- the appellate case method as utilized universally and almost exclusively in the first year of law school.

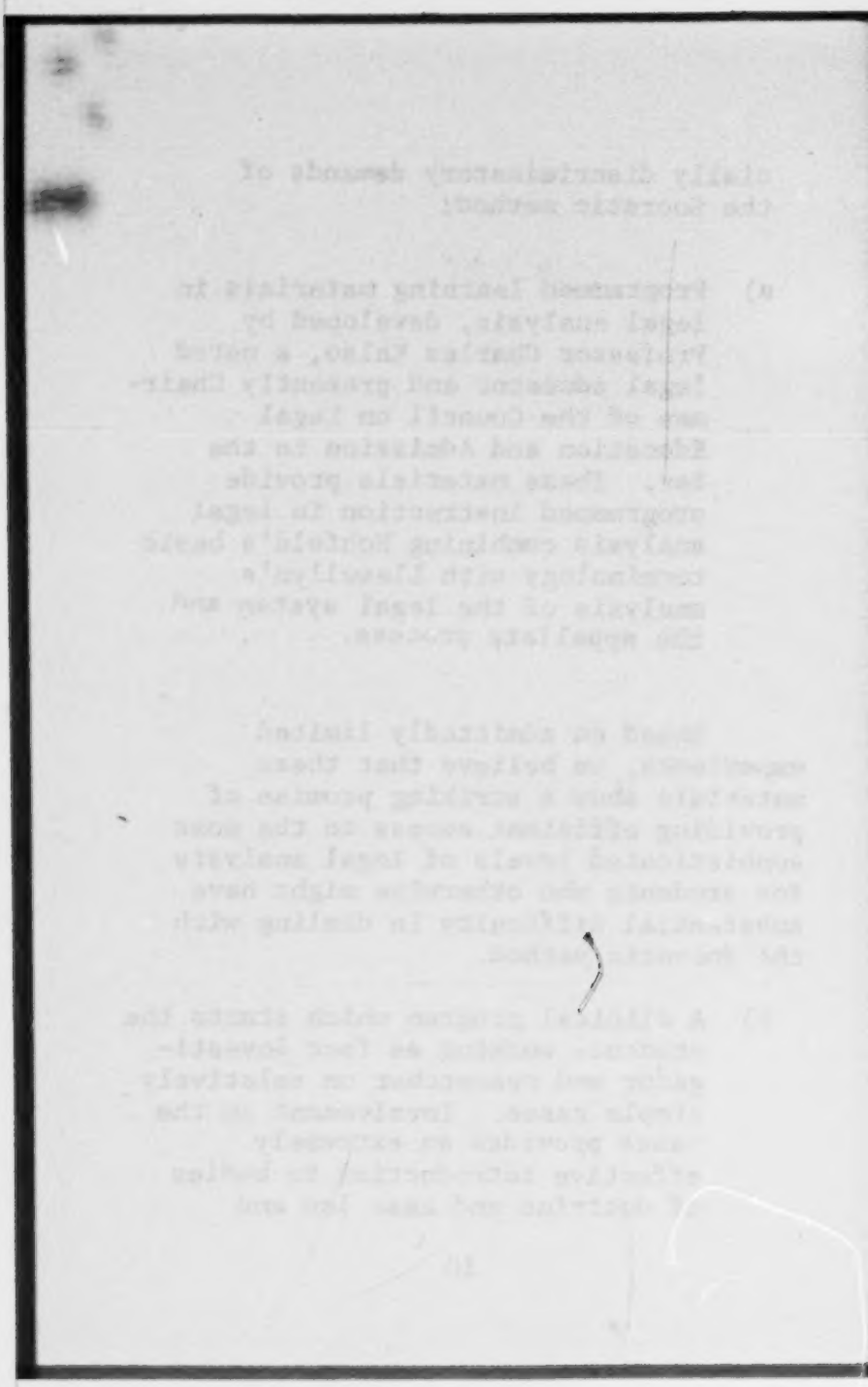
   The LSAT makes no claim of predicting ability to master legal concepts and the skills of legal analysis using educational methods other than the appellate case method. In addition to the appellate case method, Antioch uses two additional pedagogic techniques in order to minimize what we believe to be the non-functional and artifi-

cially discriminatory demands of the Socratic method:

a) Programmed learning materials in legal analysis, developed by Professor Charles Kelso, a noted legal educator and presently Chairman of the Council on Legal Education and Admission to the Bar. These materials provide programmed instruction in legal analysis combining Hohfeld's basic terminology with Llewellyn's analysis of the legal system and the appellate process.

Based on admittedly limited experience, we believe that these materials show a striking promise of providing efficient access to the most sophisticated levels of legal analysis for students who otherwise might have substantial difficulty in dealing with the Socratic method.

b) A clinical program which starts the students working as fact investigator and researcher on relatively simple cases. Involvement in the cases provides an extremely effective introduction to bodies of doctrine and case law and



provide very effective training in legal analysis, legal writing, legal research and advocacy in the context of providing service to a particular client in need of legal assistance.

2. The LSAT appears only to predict ability to acquire mastery of legal concepts through cognitive styles that are peculiarly race and class biased.

This assertion is in no way undermined by recent studies indicating that the LSAT is equally accurate as a predictor for black law students and white law students. All that it means is that blacks who cannot cope effectively with the LSAT will have difficulty coping with highly abstract symbol manipulation, with tasks lacking direct relevance, or with tasks requiring deferred gratification in terms of application to the real problems of people. Conversely, blacks who can cope with the LSAT's demands for performance (demands that we believe call for the cognitive styles of the white, upper middle class) are likely to be able to cope effectively with essentially similar demands made by the appellate case method. But that simply

raises the question of whether the appellate case method is not itself race and class biased when compared to other pedagogic methods such as programmed instruction or clinically based instruction.

We believe that the analytic skills traditionally taught by the appellate case method must be acquired. We only submit that there may be equally effective and alternate avenues to the same analytic precision.

The LSAT has been validated with respect to only one teaching method and one learning style.

Moreover, it is our observation that the LSAT does not give an adequate assessment of the potential of Native Americans or Latino applicants. It also appears that it discriminates against those who have been out of school for several years and who have grown rusty at test-taking.

In sum, we believe that exclusive or even primary reliance upon the LSAT may well result in an impermissably discriminatory admissions policy because the LSAT appears to have been:

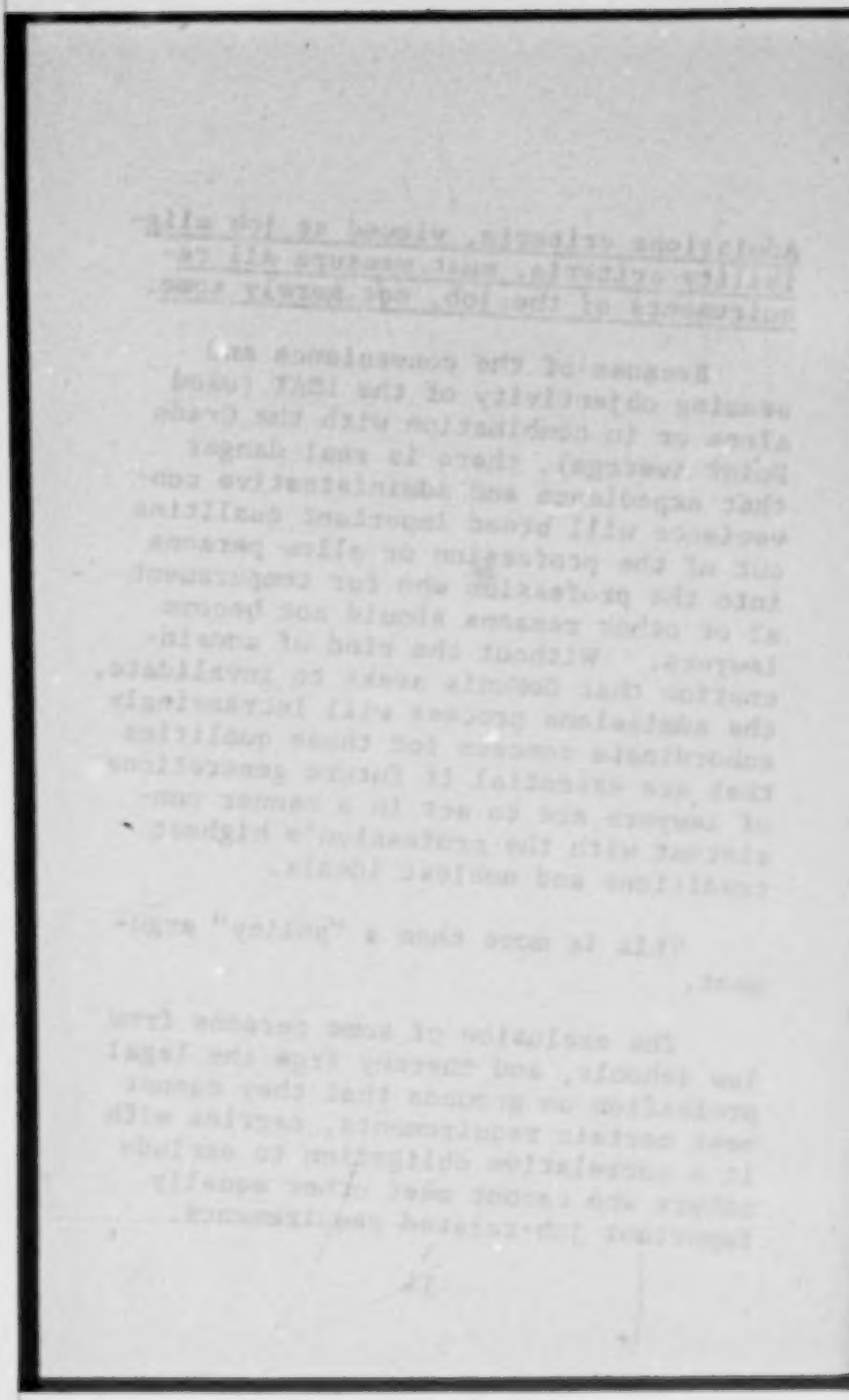
"... standardized primarily on and are relevant to a white middle class group of students [and]... produce[s] inaccurate and misleading test scores when given to lower class and Negro students." Hobson v. Hansen 269 F. Supp. 401, 514 (D.D.C. 1967), appeal dismissed, 393 U.S. 801 (1969).

Admissions criteria, viewed as job eligibility criteria, must measure all requirements of the job, not merely some.

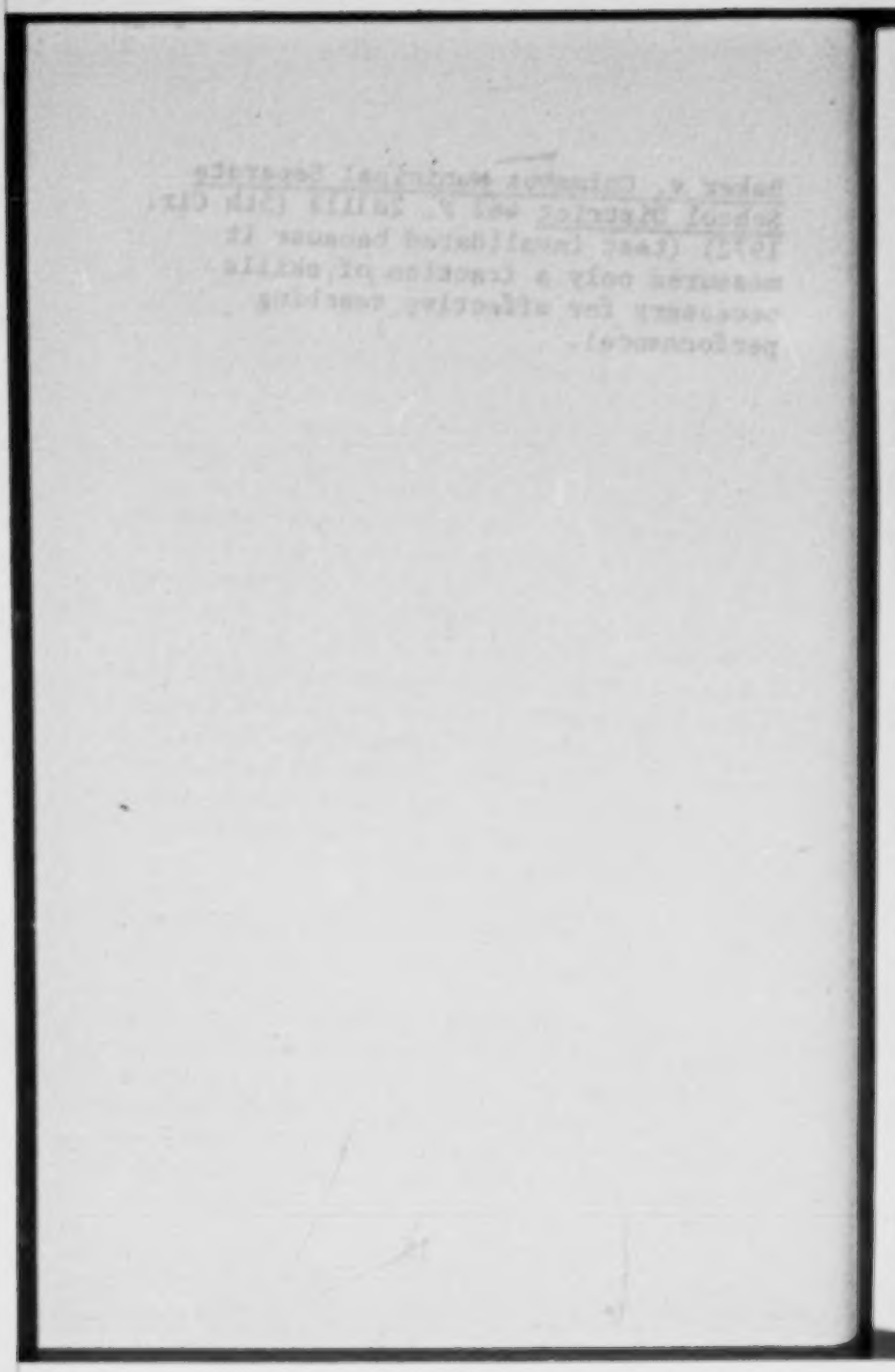
Because of the convenience and seeming objectivity of the LSAT (used alone or in combination with the Grade Point Average), there is real danger that expedience and administrative convenience will breed important qualities out of the profession or allow persons into the profession who for temperamental or other reasons should not become lawyers. Without the kind of consideration that DeFunis seeks to invalidate, the admissions process will increasingly subordinate concern for those qualities that are essential if future generations of lawyers are to act in a manner consistent with the profession's highest traditions and noblest ideals.

This is more than a "policy" argument.

The exclusion of some persons from law schools, and thereby from the legal profession on grounds that they cannot meet certain requirements, carries with it a correlative obligation to exclude others who cannot meet other equally important job-related requirements.



Baker v. Columbus Municipal Separate School District 462 F. 2d1112 (5th Cir. 1972) (test invalidated because it measured only a fraction of skills necessary for effective teaching performance).



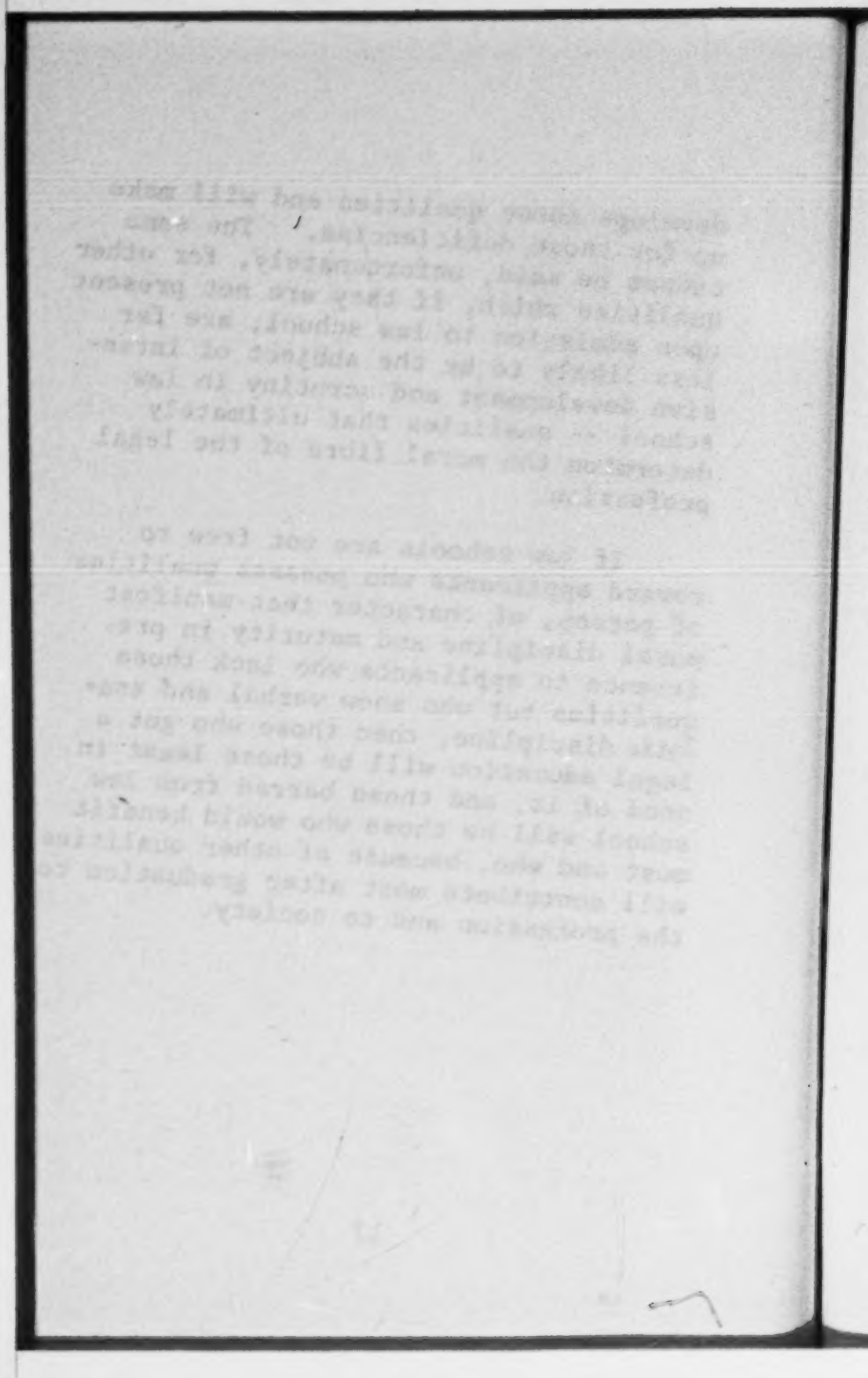
An admissions process would be arbitrary and capricious if it focussed exclusively on the possession of those competencies that are traditionally developed by law school training (e.g. analytic ability) and excluded or subordinated consideration of other qualities essential to the legal profession but which will not be the special focus of training and development in law school (e.g. problem solving skills, synthesizing ability, communications skills, self-knowledge, conscientious work habits, and sense of personal responsibility)

The admissions process that DeFunis would have law schools adopt would appear to reward with admission those who are least in need of three years of the kind of training that law schools traditionally offer but who may be most deficient in qualities which law schools do not purport to develop to the same degree (if at all) -- qualities of moral sensitivity, the sense of role, the conscientiousness over responsibility, and ability to communicate effectively with clients.

It would seem more logical to permit greater flexibility with respect to those qualities that the LSAT identifies since law school training preeminently

develops those qualities and will make up for those deficiencies. The same cannot be said, unfortunately, for other qualities which, if they are not present upon admission to law school, are far less likely to be the subject of intensive development and scrutiny in law school -- qualities that ultimately determine the moral fibre of the legal profession.

If law schools are not free to reward applicants who possess qualities of person, of character that manifest moral discipline and maturity in preference to applicants who lack those qualities but who show verbal and analytic discipline, then those who get a legal education will be those least in need of it, and those barred from law school will be those who would benefit most and who, because of other qualities, will contribute most after graduation to the profession and to society.



Our examination of the literature, meetings with consultants, and extensive inquiry during the planning process reveals that adequately validated instruments for determining whether an applicant possesses the full range of qualities, abilities, and aptitudes needed for the practice of law simply do not exist.

In planning the Antioch School of Law, we developed specific criteria and then canvassed the field intensively to see if we could not come up with tests or other measurement devices which would provide us with a more efficient and objective manner to determine the presence of certain qualities which we believed important to the profession. It suffices to say that we found none. And subsequent research, together with numerous discussions at recent meetings of the American Association of Law Schools and a review of research findings sponsored by the Law School Admissions Council lead us to conclude that there do not now exist the kind of rigorously validated instruments which will ascertain the existence and extent of development of the full range of qualities (or even an essential core of qualities and competencies) needed to be a lawyer.

Antioch is seeking to implement an experimental demonstration and research project which will:

1. review and revise admissions criteria and procedures to improve our ability to predict the potential performance of the applicants as future lawyers;

2. correlate predictions of lawyering potential made in the admissions process with actual performance of lawyering tasks by students in the clinical program;

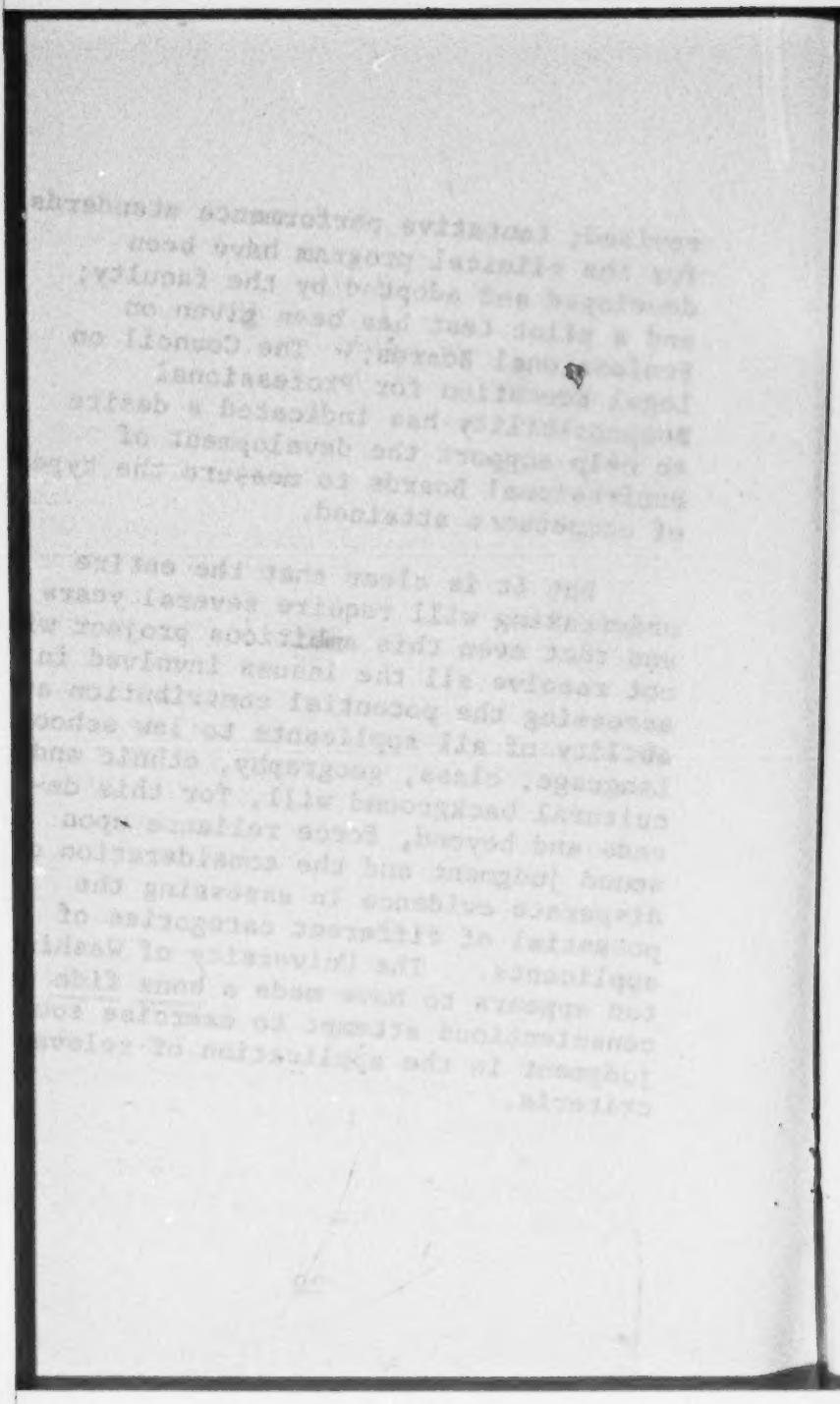
3. develop "Professional Boards" utilizing simulated cases to test competency in specific lawyering skills such as interviewing, writing memoranda, drafting pleadings, taking depositions, negotiating for settlement, direct examination and cross examination of witnesses; and

4. develop performance criteria for clinical work establish greater correlation between admissions decisions, clinical performance and performance on "Professional Boards."

The experiment is just in its beginning phases: admissions forms have been

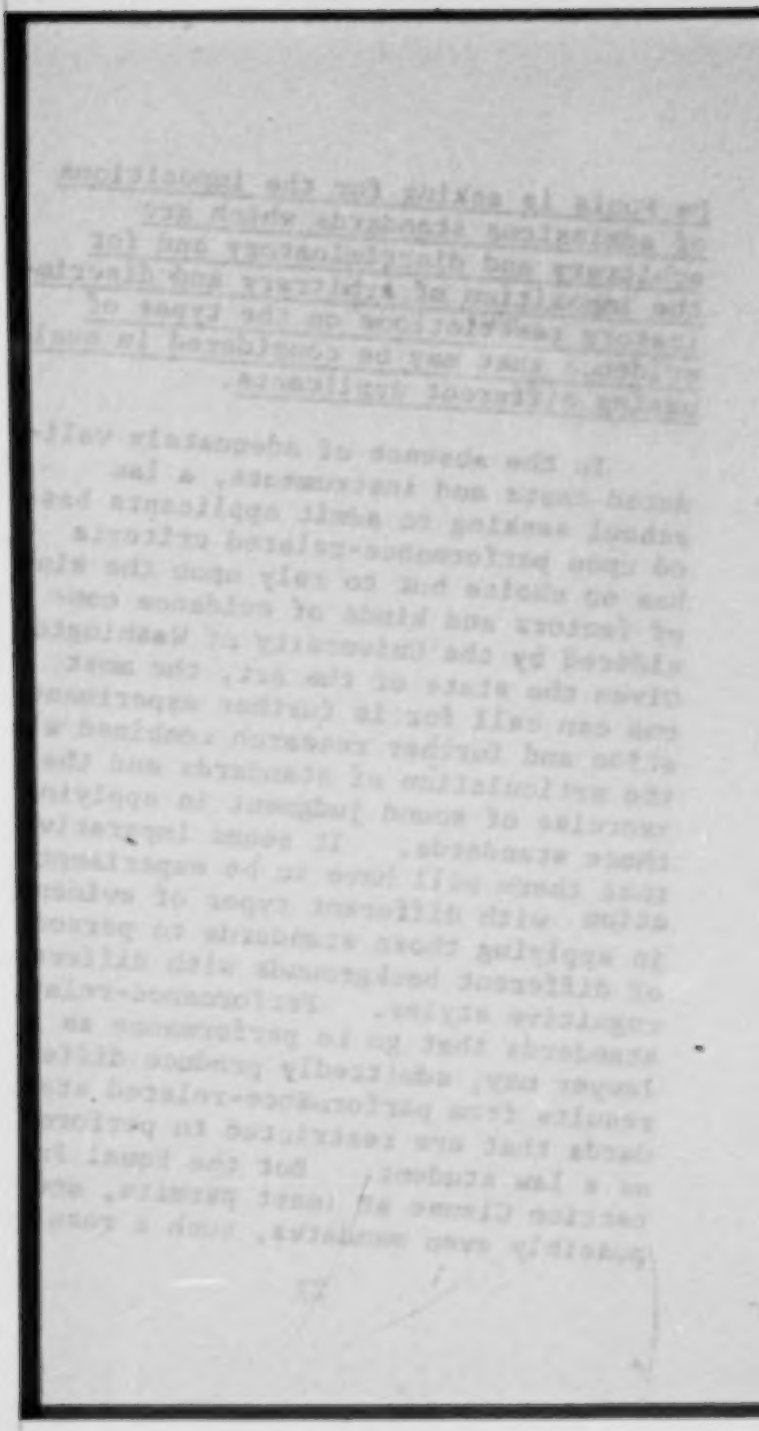
revised; tentative performance standards for the clinical program have been developed and adopted by the faculty; and a pilot test has been given on Professional Boards. The Council on Legal Education for Professional Responsibility has indicated a desire to help support the development of Professional Boards to measure the types of competence attained.

But it is clear that the entire undertaking will require several years and that even this ambitious project will not resolve all the issues involved in assessing the potential contribution and ability of all applicants to law school. Language, class, geography, ethnic and cultural background will, for this decade and beyond, force reliance upon sound judgment and the consideration of disparate evidence in assessing the potential of different categories of applicants. The University of Washington appears to have made a bona fide and conscientious attempt to exercise sound judgment in the application of relevant criteria.



De Funis is asking for the impositions of admissions standards which are arbitrary and discriminatory and for the imposition of arbitrary and discriminatory restrictions on the types of evidence that may be considered in evaluating different applicants.

In the absence of adequately validated tests and instruments, a law school seeking to admit applicants based upon performance-related criteria has no choice but to rely upon the kinds of factors and kinds of evidence considered by the University of Washington. Given the state of the art, the most one can call for is further experimentation and further research combined with the articulation of standards and the exercise of sound judgment in applying those standards. It seems imperative that there will have to be experimentation with different types of evidence in applying those standards to persons of different backgrounds with different cognitive styles. Performance-related standards that go to performance as a lawyer may, admittedly produce different results from performance-related standards that are restricted to performance as a law student. But the Equal Protection Clause at least permits, and possibly even mandates, such a result.



CONCLUSION

For the reasons stated above the Amici asks that the judgment below be affirmed.

Respectfully submitted:

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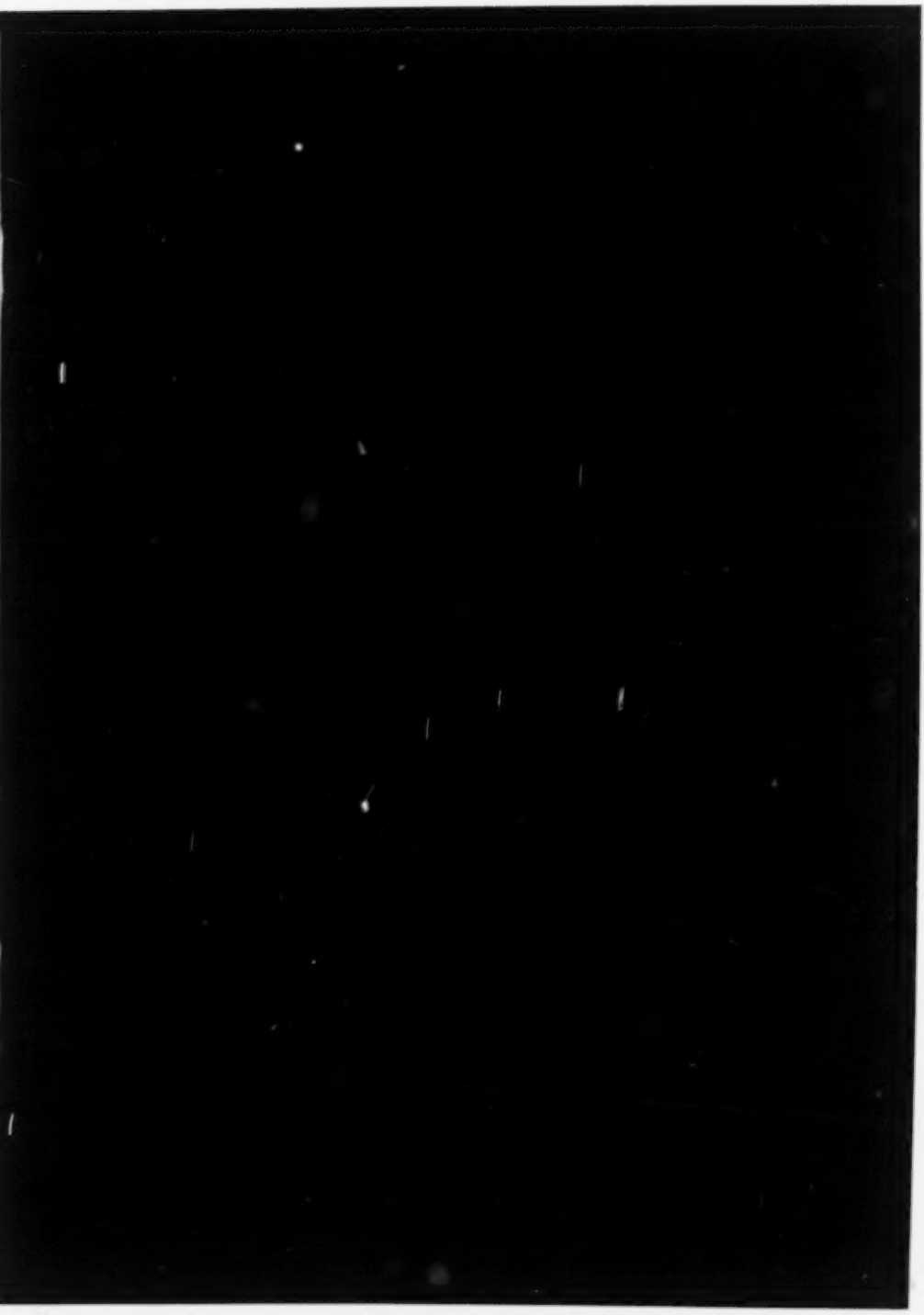

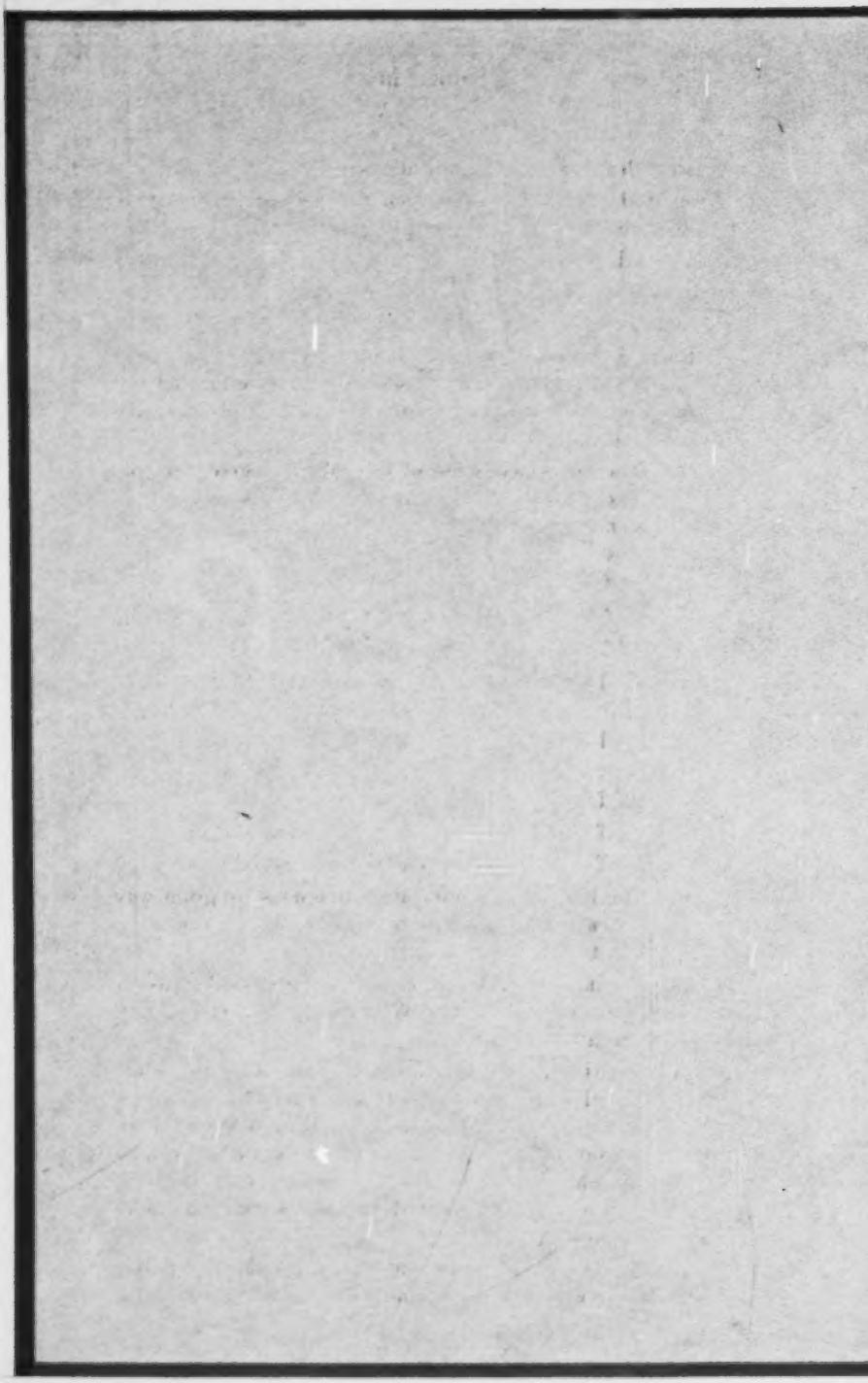

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-235

MARCO DEFUNIS, et al., *Petitioners,*

vs.

CHARLES ODEGAARD, President of the University of Washington, et al., *Respondents.*

On Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF OF THE LEGAL AID SOCIETY OF ALAMEDA COUNTY AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., AS AMICI CURIAE

INTEREST OF LEGAL SERVICE ORGANIZATIONS

Legal Aid Society of Alameda County, Atlanta Legal Aid Society, Inc., Legal Aid Bureau, Inc. of Baltimore, Legal Aid Society of Cleveland, Hawaii Legal Services Project, Michigan Legal Services Assistance Program, National Employment Law Project, Community Legal Services, Inc. of Philadelphia, and Seattle Legal Services Center, are legal service organizations which provide legal assistance to low-income individuals. A high proportion of these clients

are members of racial minority groups. Amici have found that they are able to deliver more effective legal assistance to the individuals and communities they serve when the legal staff includes minority attorneys familiar with the problems and persons of the community. Many legal service attorneys, including some who have worked on the preparation of this brief, were admitted to law school through a minority admissions program. Such programs are essential if legal services and the entire legal profession are to achieve any meaningful level of integration.

Like the NAACP, legal service organizations are continually involved in efforts to combat the effects of racial discrimination in employment, housing, schools, and many other areas. We believe that progress in civil rights depends primarily upon the voluntary efforts of public and private organizations to rectify the widespread effects of racial discrimination. Racial discrimination, although often unintended, is so pervasive that the litigation process cannot be relied upon by itself to protect the rights of racial and ethnic minorities. For these reasons, we have been involved in the creation of numerous affirmative action programs, voluntarily adopted by public agencies, that use racial classifications to remedy racial discrimination. Reversal in this case would seriously jeopardize, if not destroy, these and future programs, to the severe detriment of our minority clients.

INTEREST OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before this Court as an amicus in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The present case is of particular importance to the NAACP because it centers around a public educational institution's efforts to cure voluntarily the effects of a racially discriminatory selection device. The NAACP has long encouraged private and public bodies to take such steps and has supported legislation designed to foster voluntary compliance with the law. The concern of the NAACP is that, should this Court rule in favor of the Petitioner; the concept of voluntary compliance will be wholly nullified, educational institutions attempting to "objectify" their selection procedures will be encouraged to intensify their reliance upon the paper qualifications of applicants; and such items as the Law School Admissions Test, college degrees, and grade point averages, will once again become "masters of reality." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971). A foreseeable byprod-

uct of this process will be the resegregation of every public educational institution using such devices, as the record indicates will be the case with respect to the University of Washington Law School.

CONSENT OF THE PARTIES

With the consent of both parties pursuant to Rule 42 of the Supreme Court Rules, Amici respectfully submit this brief in support of Charles Odegaard, et al., Respondents.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case has repeatedly been characterized as one involving the legality of a "preference given on the basis of *race alone* to members of certain so-called 'minorities'." Petitioners' Opening Brief, p. 2. This characterization totally distorts the facts of the case. This is a case in which a racial classification is used not to grant a preference but, on the contrary, to alleviate severe discrimination burdening minority groups. The only person asking for a racial preference in this case is the petitioner, who asks this Court to grant a racial preference to whites by preventing the Law School from taking action which is absolutely necessary to neutralize the severely discriminatory effects of its own entry criteria.

The most fundamental fact in this case is that if the Law School had not adopted a minority admis-

sions program, its entry system would have been so grossly discriminatory as to result in the creation of an essentially segregated student body. Without the minority admissions program, only one, or at most two, of all black, Chicano, Filipino and Native American applicants would have been admitted. Furthermore, the discriminatory entry criteria do not measure the ability to perform in the legal profession, or for that matter, the ability to perform in law school. Thus, Petitioner requests that he be granted an admissions preference on the basis of severely discriminatory entry criteria which are invalid and unjustified by any state interest.

This brief admittedly attacks several revered traditions in the admission procedures of most educational institutions. It does so for a reason. This brief will show that the University of Washington Law School has in the past used entry criteria which have little or no demonstrable relationship to law school performance, and even less to subsequent performance as a lawyer. Given this background, Amici argue that the Law School not only has the freedom to try different selection criteria which will increase minority participation, while not hurting the quality of legal education and legal practice, but in fact may be constitutionally required to use different criteria.

This brief presents four reasons why the decision of the Supreme Court of the State of Washington should be affirmed. First, as stated above, the relief requested by petitioner would be illegal if granted since it involves a return to a discriminatory system

which does not satisfy the requirements of the equal protection clause, the rule of *Griggs v. Duke Power,* and Title VI of the Civil Rights Act of 1964. Second, public agencies such as the Law School have discretion to adopt programs, such as the minority admissions program, designed to rectify the discriminatory effects of their own screening mechanisms. Third, the Law School's minority admissions program does not involve the type of racial classification to which the presumption of unconstitutionality applies; since the program is rationally related to legitimate state interests, it is constitutionally permissible. Fourth, even if the racial classification were characterized as suspect, the minority admissions program serves a compelling state interest and is, therefore, constitutionally valid. Each of these four reasons is sufficient for affirmance.

ARGUMENT

I. FACTUAL ANALYSIS: THE TRADITIONAL SCREENING DEVICES USED BY THE LAW SCHOOL HAD A SEVERELY ADVERSE IMPACT ON NONWHITE APPLICANTS AND WERE NOT JUSTIFIED BY ANY SUBSTANTIAL STATE INTEREST.

A. The Law School's use of the college degree, the college grade point average and the Law School Admission Test score as entry criteria almost entirely excluded minority applicants.

The record before this Court establishes that the Law School, in screening applications for the class which was to enter in 1971, used at least three separate criteria which were severely discriminatory in

effect against nonwhite persons.[1] First, the Law School had an absolute requirement that applicants be college graduates. Applications from nongraduates were not even considered. Second, the Law School used the applicants' college grade point averages (GPA's) as a screening factor. Third, the Law School used the applicants' scores on the Law School Admission Test (LSAT) as a screening factor. Furthermore, the GPA and LSAT were not simply two screening devices among many; they were the fundamental criteria which determined in most instances which persons were to be admitted or excluded. The record makes it quite clear that if nonwhite race had not been used as a neutralizing entry criterion, *all but one* of the nonwhite applicants (excluding Asian) would probably have been denied admission, nearly all of these on the basis of LSAT score and GPA alone. The severely discriminatory effect of each of the three entry criteria is explained fully in the following sections.

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[1]Respondents, in presenting their case below, did not concentrate on making a clear record regarding the racially discriminatory effects of their own entry criteria. This is quite understandable since it is not easy either to recognize or to display publicly the facts regarding racial discrimination within one's own organization. It is therefore not surprising that respondents chose to present the case in terms of the permissibility of their minority admissions program rather than in terms of the illegality of their traditional entry system. Despite the fact that no direct effort was made to prove the discriminatory effect of the entry criteria, however, the record does contain sufficient information to compel the conclusion that the entry system would have discriminated against nonwhites if race had not been used as a neutralizing entry criterion.

1. **The college degree.**

Information gathered during the 1970 Census demonstrates that the percentage of white persons who obtain college degrees is much higher than it is for persons of nonwhite races.[2] In 1970, only 6.1% of all black persons between the ages of 25 and 34 had completed four or more years of college while 16.6% of white persons between the ages of 25 and 34 had completed four or more years of college. Census Report at 81, Table 67. Thus, the percentage of white persons who have completed four or more years of college is nearly three times as high as the percentage of black persons.

TABLE A

PERCENT OF POPULATION 25 TO 34 YEARS OLD WHO COMPLETED FOUR YEARS OF COLLEGE OR MORE.

	Black	*White*
1960	4.3%	11.7%
1966	5.7%	14.6%
1970	6.1%	16.6%

Additional tables which appear at pages 82 and 84 of the Census Report show that the racial disparity also exists in present college enrollment and that other minority races are similarly underrepresented.[3]

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[2]Census information is, of course, subject to judicial notice by this Court. Statistics comparing college attendance of black and white persons have been set forth in *The Social and Economic Status of Negroes in the United States*, 1970 BLS Report No. 394, published in 1971 by the Bureau of the Census [hereafter referred to as the Census Report].

[3]The use of the college degree as a strict prerequisite for entry may account in large part for the fact that only 4.4% or 70 out of 1601 applicants for entry into the Law School in 1971 were non-

2. The college grade point average (GPA).

A recent study by Leonard L. Baird of the Educational Testing Service (hereinafter ETS) has established, on the basis of solid and extensive data, what has been known from narrower studies for a long time, namely, that the average college GPA of white students is substantially higher than of nonwhites. Baird, *Blacks in Graduate and Professional School, Findings,* vol. 1, no. 2 (Princeton, N. J.: Educational Testing Service, 1974).[4] The study was based upon a survey of 21,000 students who were seniors in 1971 at 94 colleges across the nation.

For purposes of this brief, the key finding in Baird's study is set forth at page 5.

> About a third (34 percent) [of the black students] had undergraduate grades of C or C+, compared to 16 percent of the whites; 44 percent had B grades compared to 32 percent of the whites; and only 21 percent had B+, A or A+ grades compared to 50 percent of the whites.

In tabular form, these findings are as follows:

	Race	
GPA	*Black*	*White*
B+ and above	21%	50%
B	44%	32%
C or C+	34%	16%

white. Clearly some discriminatory mechanism was operating even prior to the receipt of applications, and it seems safe to conclude that the college degree requirement played a substantial role in reducing the percentage of minority applications to such a disproportionate level.

[4] This study is about to be published.

As these findings show, the percentage of white college students having GPA's of B+ or above is nearly two and one-half times as high as that of blacks, and the percentage of white students having GPA's in the C range is less than half that of blacks. The severely discriminatory effect of the use of the college GPA as an entry criterion for graduate school is particularly striking in view of the fact that most graduate schools tend to expect at least a B+ college GPA on the part of those students to whom they offer admission.[5]

From the data available in the record in the present case, it appears that the use of college GPA's for screening Law School applicants in 1971 would have had a substantial discriminatory effect if it had not been neutralized by the minority admissions program. Of the 328 applicants whose GPA's are reported in the Single Appendix, only 4.2% of the whites had GPA's below 3.0, while 43.2% of the nonwhites had GPA's below 3.0 (A-37-46).[6]

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[5]Baird's study confirms findings of previous studies which were based on narrower data. *See, e.g.*, Cleary, *Test Bias: Validity of the Scholastic Aptitude Test for Negro and White Students in Integrated Colleges* (Princeton, N.J.: Educational Testing Service, 1966), at 16-19.

[6]This analysis is based solely upon data in the record relating to persons invited to attend or on the waiting list as of August 1, 1971. If Asians were excluded from the figures for nonwhites, the discriminatory effect would be substantially greater than that shown in the table. On the other hand, if GPA's of the other white applicants were taken into account, the difference might be lowered. The difference would not, however, be neutralized, since the severe disparity between PFYA's of whites and nonwhites reflects substantial disproportion in both GPA's and LSAT scores. *See* section I(A)(4).

	Race	
GPA	*Nonwhite*	*White*
Below 3.0	43.2% (19)	4.2% (12)
3.0 to 4.0	56.8% (25)	95.8% (272)

3. The Law School Admission Test (LSAT).

A recent study demonstrates that blacks score on the average substantially lower than whites on the LSAT.[7] Evans & Reilly, *A Study of Speededness as a Source of Test Bias,* Journal of Education Measurement, vol. 9, no. 2 at 123-31 (1972). The study was based upon a comparison between the LSAT performance of 465 black students enrolled in predominantly black southern colleges and a random sample of 2495 students tested at regular testing centers in 1970. The purpose of the study was to determine whether the time limits involved in the LSAT have a discriminatory effect on blacks. In order to reach any conclusions on this issue, the study team had to generate data on the mean LSAT scores of the special black sample and the regular sample. These data are set forth in the following table:

[7]This Court has had first-hand experience with discriminatory written aptitude tests in the *Griggs* case, in which the Wunderlic Personnel Test was held to be discriminatory and its use enjoined. *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

Mean LSAT Score	
Black sample (speeded)	56.12 (n=230)
Black sample (unspeeded)	56.49 (n=235)
Regular sample (speeded)	86.27 (n=1251)
Regular sample (unspeeded)	85.99 (n=1245)

As the table shows, the black students had an average score of roughly 56 while the regular students had an average score of roughly 86. The discriminatory effect was, in short, drastic.[8]

The record in this case strongly suggests that the unneutralized use of LSAT scores would have had a severely discriminatory impact on the applicants for Law School entry in 1971. The following table is based upon data contained in the Single Appendix at 37-46 for the 330 applicants who were either invited to attend the Law School or placed in the top two quartiles of the waiting list.

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[8]It should be pointed out that the black sample used in this study was not random. The sample was obtained solely during a "fee free" administration of the test at predominantly black southern colleges. Thus, there are at least three factors that might introduce bias into the study: (1) the omission of nonsouthern schools, (2) the omission of integrated schools and (3) the fact that no fee was charged. It is clear, however, that these factors cannot account for the drastic difference in scores.

This is confirmed by two recent but not yet published studies by the Educational Testing Service, which demonstrate substantially disparate mean LSAT scores of whites and nonwhites. While we have been informed of these studies by ETS personnel, ETS has so far refused to make these studies public.

	Race	
	Nonwhite	*White*
600 and above	27.3%	87.7%
LSAT Score		
below 600	72.7%	12.3%
500 and above	59.1%	100.0%
LSAT Score		
below 500	40.9%	0.0%
60 and above	29.5%	76.5%
Reading Score		
below 60	70.5%	23.5%

Thus, the conclusion is unavoidable that the Law School's use of the LSAT as an entry criterion would have had a severe racially discriminatory effect if it had not been neutralized by the minority admission program.

4. The Predicted First Year Average (PFYA).

The extremely discriminatory effect of the Law School's screening system is further evident from the facts present in the record regarding the use of the Predicted First Year Average (PFYA) as a major screening factor. The PFYA is a composite measure based upon college GPA (junior-senior years) and LSAT scores. Since, as shown above, both of these criteria are discriminatory, it is no surprise that the PFYA is also discriminatory. The following table shows that, if the PFYA's of *all 1601* Law School applicants are taken into account, the percentage of

whites who had PFYA's above 75 was more than two and one-half times that of nonwhites.

	Race	
PFYA	*Nonwhite*	*White*
Above 75	12.9% (9)	34.0% (531)
Below 75	87.1% (61)	66.0% (1000)

Petitioner, Marco DeFunis, had a PFYA of 76.23. At that score, the disparity between whites and nonwhites is even more extreme. The rate at which nonwhite applicants achieved PFYA's above that figure was nearly six times the rate of the nonwhite applicants. Most striking is the fact that only one non-Asian minority in comparison to 282 whites achieved a score above 76.23.

	Race	
PFYA	*Nonwhite (Excluding Asians)*	*White*
Above 76.23	3.2% (1)	18.4% (282)
Below 76.23	96.8% (30)	81.6% (1249)*

*The tables in this section are based upon figures set forth in the Single Appendix. 540 of the 1601 applicants had PFYA's above 75 (A-34). 9 of the 44 nonwhite applicants invited to attend had PFYA's above 75 (A-37-46). Since nonwhites with much lower PFYA's than 75 were admitted, it is assumed that all of the 26 nonwhites who were denied had PFYA's lower than 75. Since only 9 of the 540 applicants whose PFYA's exceeded 75 were nonwhite, the other 531 were white.

288 applicants had PFYA's above 76.3 (A-34) and therefore above Marco DeFunis whose PFYA was 76.23 (A-34). Only 6 nonwhites had PFYA's above DeFunis (A-37-46, 52). Therefore, at least 282 of the 1531 white applicants had PFYA's above DeFunis. Only 1 out of 31 nonwhites (excluding Asians) had PFYA's above De Funis (A-56). Note, also, that if the 26 nonwhites who were denied admission were included in this table, the

When these figures are analyzed further, it appears that if the Law School had not sought to neutralize the discriminatory effect of the PFYA, the admissions system would have resulted in an essentially segregated Law School. In all probability, of the combined applicants from the black, Chicano and Native American races, at most two would have been admitted if the Law School had not developed a minority admissions program. Out of 1315 white applicants with PFYA's below 76.20, only 33 (2%) were invited to attend. Since all but one of the non-Asian minority applicants had PFYA's below 76.20, we must assume that if race had not been used as a factor, only 2% would have been invited to attend. Thus, at most, one black, Chicano or Native American might have been invited in addition to the one who had a PFYA above 76.20.

In sum, the unneutralized use of the Law School's entry system (including the use of the college degree, the GPA, the LSAT score and the PFYA) would have had an almost totally exclusionary effect on non-Asian minority applicants and would have perpetuated the past racially segregated character of the Law School.[10]

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nonwhite percentage would be even lower. Thus, the 3.2% figure is substantially higher than the complete figure.

It should be noted that these tables include data on all 1531 white applicants, so the differences are real and not subject to any arguable reduction.

[10]There are cases which suggest that a fourth factor, the requirement of recommendation letters, may also have been discriminatory. See, e.g., *Hawkins v. North Carolina Dental Society*, 355 F.2d 718 (4th Cir. 1966); *Meridith v. Fair*, 298 F.2d 696 (5th Cir. 1962).

B. The entry criteria which adversely affect minority applicants are not justified by any substantial state interest.

1. The college degree.

Policies governing requirements for bar membership in various states demonstrate that there is no substantial reason for using college graduation as a prerequisite for entry into law school. *See, e.g., Black's Law Dictionary* (Rev'd 4th ed. 1968), pp. LXXV-LXXX. As late as 1968, only seven states required a college degree or its equivalent as a prerequisite to beginning law study. *Ibid.* The American Bar Association's recommendation was only three years' college study before the start of law school. *Ibid.* Furthermore, the entire history of the Americal legal profession flies in the face of any contention that a college degree requirement for lawyers is necessary to the operation of the legal profession. This Court can take notice of the fact that college graduation was historically not a requirement for entry into law. On the contrary, the legal profession, like the other skilled trades, used apprenticeship as its training method. Persons seeking to become lawyers obtained positions in the offices of practicing lawyers and learned law through on the job training.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court emphasized the danger of using diplomas and degrees as fixed barriers to economic opportunities.

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas and degrees as fixed measures of capability. History is filled

> with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas or degrees. 401 U.S. at 433.

Nowhere is this statement more applicable than in the legal profession. In this regard it is worth noting that Abraham Lincoln, who had only one year of formal education, would have been summarily denied admission under the criteria used by the Law School.

2. The college grade point average (GPA).

Available evidence from the social sciences demonstrates that college grade point average does not have a substantial correlation with success in law or indeed in any other vocation. One study summarizes the available research on the issue through 1965. Hoyt, *The Relationship between College Grades and Adult Achievement. A Review of the Literature* (Iowa City, Iowa: American College Testing Program, 1965). In his report, Hoyt examined the relationship between college grades and adult achievement in business, teaching, engineering, medicine, scientific research, miscellaneous additional occupations (including law) and non-vocational activities. The overall conclusion of the study is that college grades have no demonstrable relationship to any measures of adult accomplishment.

> Although this area of research is plagued by many theoretical, experimental, measurement, and statistical difficulties, *present evidence strongly suggests that college grades bear little or no rela-*

tionship to any measures of adult accomplishment. Id. at i. (Emphasis added.)

The conclusions reached in Hoyt's report for the specific areas examined are as follows:

Business: "The weight of evidence suggests no relationship between the two [college grades and future success in business]." *Id.* at 12.

Teaching: "Only isolated examples from past research indicate a correlation between grades and a measure of teaching success. In those instances where positive results were found, the relationships were generally of a very low magnitude." *Id.* at 20.

Engineering: "Until more intensive work is done to devise suitable criteria of engineering success, the relationship of college grades to engineering performance cannot be established definitely." *Id.* at 24.

Medicine: "At this time, medical school grades seem to bear a positive relationship to the early success of physicians. These grades are apparently not predictive of physician performance after the first few years of practice. The evidence suggests that undergraduate grades are unrelated to success in medical practice." *Id.* at 30.

Scientific research: "While all findings are not perfectly consistent, college grades seem to have no more than very modest relationship to measures of research performance." *Id.* at 36.

These findings are quite striking for several reasons. First, the conclusion that is consistently reached is that college grades have either no correlation or at

best a very modest correlation with adult achievement. Second, the studies focused on professional activities such as medicine and engineering, which are sufficiently similar to law to raise similar doubts about the relationship between college grades and success in legal work. Third, the report even rebuts the relationship between college grades and success in such purely "academic" fields as scientific research, where one would expect some substantial relationship to exist if anywhere. Thus, on the basis of the available research, it seems safe to conclude that college grades are certainly not significantly related to success in the down to earth, rough and tumble of law practice and probably not related even to success in the more academic side of law, including research, teaching and appellate work.[11]

Perhaps the most sophisticated study on this subject was that reported by Price, Taylor, Richards and Jacobsen in *Performance Measures of Physicians* (University of Utah, 1963). In carrying out the study, the team analyzed approximately 200 performance measures (including ratings by other physicians, self-ratings, number of requests for consultation, contributions to the field, quality of hospitals in which work

[11]The available research dealing with the legal profession itself was unfortunately too meager to allow any firm conclusion. These studies are reported at page 37 of Hoyt's report. Two rather early and unsophisticated studies (Kunkel 1917; Gambrill 1922) suggested "a modest relationship between academic and occupational success." A later study (Jepsen 1951) involving doctors, lawyers, and engineers shows "a significant negative correlation (—.15) . . . between college GPA and salary."

was performed, etc.) and then settled on 80 measures which were used for computer analysis. The sample studied included 102 medical school faculty members, 190 certified medical specialists and 217 general practitioners. The results of the study are set forth in the following important statement:

> *A second, very consistent finding of this research was that academic achievement does not bear a positive relationship to performance as a practicing researcher, academician, or physician.* On the contrary, in each of our five studies both premedical and medical school achievement was found to be essentially independent of the numerous measures of professional contributions, accomplishments, and activities that we analyzed. . . . [*A*]*cross all groups studied . . . academic grades showed a zero (chance) relationship to our measures of physician performance. In view of this, medical school selection programs, which tend to select students that have attributes necessary for successful accomplishment in medical school and assume that these same attributes are also necessary for performance in medical practice, should be searchingly examined. Id.* at 111. (Emphasis added.)

The Price, Taylor report is important because it is an extremely sophisticated study of an important professional field which demonstrates a radical absence of relationship between college grades and professional performance.

The studies reported in this section raise another important point, namely the relationship between *law school grades* and success in the practice of law. The

studies indicated that there is no substantial correlation between graduate school grades and success in professional life. The Price, Taylor study, for example, found that *"both premedical and medical school achievement"* showed a "zero (chance) relationship" to physician performance. This finding was confirmed by Hoyt, who states that medical school grades are "not predictive of physician performance after the first few years of practice." Hoyt, *supra* at 30. Thus, even if college grades did accurately predict law school grades, this would not justify the use of college grades as a law school entry criterion, since law school grades are immaterial to success in the legal profession, the agreed goal of the law school program.

Finally, and this is the point which ultimately reduces petitioner's position to its true absurdity, college GPA's are not even good predictors of law school grades. In fact, college GPA's are not even good predictors of *first year* law grades.

> Yet even if the probability of earning good grades is accepted as the most justifiable basis for selecting graduate students, problems still remain in the use of undergraduate grades for selection. *They just don't predict graduate school grades very well.*
>
> Studies relating undergraduate grades to first-year grades in graduate and professional schools over the past 20 years and in all kinds of programs have shown correlation coefficients that fluctuated around the value 0.30. Warren, *Current Grading Practices* (Washington, D.C.: American Association for Higher Education, 1971) at 5.

In short, college GPA's are relatively poor predictors even of first year graduate school grades. What about college GPA's as predictors of second and third year grades? Here the performance is even poorer, particularly in clinical courses.[12]

> Predictions of grades beyond the first year of graduate school have been still lower, and predictions of grades in clinically oriented programs have been little better than chance. *Id.* at 6.

Once these facts are understood, the irony of petitioner's position becomes manifest. Petitioner asks this Court to order the Law School to admit him in preference to nonwhite applicants on the basis of a criterion which purports to predict first year law school grades, but which does so poorly, which predicts second and third year grades even more poorly, which does not predict grades in clinical courses and which does not predict the achievement of the law school student after graduation. To grant petitioner's request would be to raise first year law school grades to a position of independent significance which they cannot begin to merit and then use them as a basis for denying to the nonwhite races entry into the legal profession, thereby ignoring one of the most important rights in the American system, namely, the right to equality of opportunity without regard to race. As Hoyt stated in the conclusion of his study.

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[12]Clinical courses are often more representative of actual work in the legal profession generally than are the purely academic courses.

The practice of basing admission to schools of education, business, engineering, or medicine[13] largely or exclusively on undergraduate grades seems indefensible. Hoyt, *supra* at 49-50.

3. The Law School Admission Test Score (LSAT).

The record is totally devoid of any evidence that the LSAT is job related, i.e., that it is a valid predictor of performance within the legal profession. One reason for this is that no validation studies have been undertaken. This fact has been confirmed by the Educational Testing Service, the organization which is responsible for administering the LSAT. Furthermore, it is very unlikely that the LSAT (an aptitude-type test) would correlate with success in a general field as broad and diversified as the legal profession. The federal courts have consistently frowned upon the use of a single general symbolic-analytic aptitude test as a screening device for entry into a general field containing a wide variety of different jobs for the obvious reason that written tests simply cannot accurately measure the qualification of individuals for widely divergent human activities. *See, e.g., Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) (Wunderlic Personnel Test); *Armstead v. Starkville Municipal Separate School District,* 461 F.2d 276 (5th Cir. 1972) (Graduate Record Examination); *Chance v. Board of Examiners,* 458 F.2d 1167 (2d Cir. 1972) (National Teachers Test).

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[13] And, we would respectfully submit, law.

Furthermore, the available evidence suggests that the LSAT is not even a valid predictor of law school grades. *See, e.g.*, Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar*, 20 Journal of Legal Education 175 (1967):

> Research reports to date present overwhelming evidence that tests used in the selection process do not predict the criterion of grades at any practical level, including a report concerning LSAT (Barbara Pitcher, 1965) published by Educational Testing Service.

The Court should note that the LSAT is designed solely to predict first year law school grades. If second and third year grades are taken into account, the correlation is even below that reported by Goolsby. Finally, the LSAT is not designed in any way to predict performance in clinical courses, which may be more directly related to actual performance within the legal profession than grades in academic courses.

C. The Law School's minority admissions program was a reasonable attempt to rectify the exclusionary effects of its entry criteria.

We have demonstrated that if the Law School's minority admissions program had not existed its entry criteria would have excluded all but one, or at most two, black, Chicano, and Native American applicants. Furthermore, we have demonstrated that the exclusionary criteria are invalid since they do not measure the ability of the applicant to practice law, or for

that matter, the ability of the applicant to perform in law school. In any case, it is clear that the record does not demonstrate that the entry criteria are valid.

The Law School's minority admissions program was a reasonable attempt to neutralize the exclusionary effect of the invalid entry criteria. Unlike a quota, the minority admissions program did not establish an inflexible percentage or number of minority applicants to be admitted regardless of their qualifications. The minority admissions program was a perfectly proper attempt by the Law School to provide an alternative method for locating qualified minority applicants without being solely restricted to the discriminatory and invalid entry criteria that had unjustifiably excluded them in the past.

The evidentiary record indicates that approximately twelve percent (eighteen out of one hundred and fifty) of the enrollees at the Law School in 1971 were minority. This percentage is substantially less than the percentage of minorities in the United States, i.e., approximately 16.3% not including Asians. This fact is particularly important in light of the explicit policy of the Law School to become a national law school and to seek students throughout the United States. Furthermore, the percentage of minorities admitted to the Law School reasonably reflects the minority percentage in the immediate Seattle area (11.0% not including Asians) and in the Western United States (15% for the states of Washington, Oregon, California, Montana, and Idaho). These percentages clearly indicate that the Law School's minor-

ity admissions program only neutralized the discriminatory effects of its entry system.[14]

It is important to note that the minority admissions program does not result in the admission of unqualified persons. On the contrary, it is based upon an accurate perception by the Law School that the mechanical entry criteria are not adequate measures of qualifications for minority persons. Indeed, as discussed above, the entry criteria do not even validly measure the qualifications of white applicants. This points out a fundamental fallacy that reappears consistently in the briefs submitted by petitioners and amici. They argue that Marco DeFunis is more qualified than the minorities who were invited to attend the Law School. Yet, the contention that petitioner is more qualified is primarily based upon the fact that he had a somewhat higher performance on the PFYA. Since the PFYA is an invalid measure of qualifications, the small difference in the PFYA scores simply does not prove that he is more qualified.

II. LEGAL ANALYSIS: THERE ARE FOUR INDEPENDENT REASONS WHY THE DECISION OF THE WASHINGTON SUPREME COURT MUST BE AFFIRMED.

Petitioner's request for relief must be denied for four separate reasons. First, the relief requested by petitioner would contravene the equal protection

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[14]We believe that even if the Law School had enrolled a higher percentage of minorities than presently reside in the western states, this would have been a proper means of eradicating the effects of its own past discrimination. In any case, it is not essential to reach this issue here.

clause and the Civil Rights Act of 1964 since, by requiring a return to the former system of admissions, it would give preference to white applicants, and almost totally exclude nonwhite applicants, solely on the basis of entry criteria which are racially discriminatory in effect and which are not justified by any substantial state interest. Second, public agencies such as the Law School have discretion to adopt programs designed to neutralize the effects of agency policies which have an adverse impact on racial minorities. Third, the racial classification used by the Law School should not evoke the presumption of unconstitutionality normally applied to racial classifications burdening racial *minorities;* since the Law School has shown that the minority admissions program is reasonably related to a legitimate state purpose it should be upheld. Fourth, even if the most rigorous standard of equal protection review were used to test this program, it would be satisfied because the program is justified by several overriding state interests.

A. Petitioner asks this Court to issue an unconstitutional order since the relief requested would require the law school to return to a system of admissions that gives priority to white applicants on the basis of discriminatory entry criteria which are not justified by any substantial state interest.

The preceding section of this brief established, first, that inflexible application of the Law School's mechanical entry criteria would almost totally exclude minorities from a legal education, and from the legal profession, and second, that these mechanical criteria are not validly related either to performance within

law school or the legal profession. Given these facts, it is evident that petitioner has mischaracterized the case when he refers to it as a "minority preference case." To the contrary, it is precisely petitioner who seeks to obtain an illegal preference when he asks this Court to order the Law School to give him priority over nonwhite applicants solely on the basis of invalid and racially exclusionary entry criteria. The relief that petitioner requests must be denied since it would contravene (1) the equal protection clause as traditionally understood, (2) the equal protection clause as interpreted in light of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and (3) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which this Court recently relied upon in striking down educational policies which had a discriminatory effect on minority groups. *Lau v. Nichols*, 42 USLW 4165 (Jan. 21, 1974).

1. The equal protection clause prohibits a public law school from using entry criteria which disproportionately disqualify nonwhites in the absence of a substantial or compelling justification.

Stated most charitably, this case involves the use of facially neutral entry criteria which almost totally exclude racial minorities. Numerous decisions of this Court and lower courts hold that such exclusion violates the equal protection clause unless it is specifically shown to be justified by some substantial state interest. *See, e.g., Turner v. Fouche*, 396 U.S. 346 (1970); *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Louisiana v. United States*, 380 U.S. 145 (1965); *Griffin v. School Board*, 377 U.S. 218 (1964);

Hill v. Texas, 316 U.S. 400 (1942); *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276 (5th Cir. 1972); *Carmichael v. Craven*, 457 F.2d 582 (9th Cir. 1971), *cert. denied*, 409 U.S. 929 (1972); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).[15]

Whenever a state classification has a substantially adverse impact on minority races, at a minimum, the state has the obligation to justify its action.

> [T]he Board's examinations have a significant and substantial impact on black and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious *de facto* classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such a classification "be justified by legitimate state considerations." (citations omitted.) *Chance v. Board of Examiners*, 458 F.2d 1157, 1175-76 (2d Cir. 1972).

See, e.g., Otero v. New York Housing Authority, 484 F.2d 1122 (2d Cir. 1973); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972); *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 393 U.S. 801 (1969).

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[15]This Court has explicitly stated that a finding of illegal racial discrimination does not need to be based upon a prior finding of intent or purpose to discriminate. *See, e.g., Palmer v. Thompson*, 403 U.S. 217, 225 (1971); *Griffin v. School Board, supra; NAACP v. Button*, 371 U.S. 415 (1963).

There has been no adequate showing of a legitimate state interest justifying the entry criteria used in this case.[16] On the contrary, as demonstrated in section I. B *supra* of this brief, the college degree, the college GPA, and LSAT scores do not validly predict success in the legal profession or even, to any substantial degree, success in law school. These criteria are only useful in that they have a mild correlation to first year law school grades. Their use for this extremely limited purpose cannot possibly justify the exclusion of black, Chicanos and Native Americans from legal education and entry into the legal profession.

Furthermore, there are at least three reasons why this Court should subject the Law School's use of discriminatory entry criteria to particularly close scrutiny and deny the relief requested in the absence of a showing of an overriding need to continue their use. First, respondents were aware of the impact of their admissions criteria. At least some of the respondents

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[16]We believe that in this case the petitioner should have the burden of proving the substantial state interest supporting the use of the discriminatory entry criteria. In the normal case of alleged racial discrimination, the plaintiff seeks to enjoin the use of discriminatory criteria, and the burden is upon the state to justify its continued use of that criteria. However, in this case, petitioner seeks to compel the Law School to use discriminatory criteria for purposes of admitting him instead of nonwhite applicants. Since the Law School opposes the exclusive use of those criteria, it would make no sense to require the Law School to prove that the criteria are supported by a substantial state interest.

Moreover, in this case, petitioner asserts that he is more qualified than nonwhite applicants that have been admitted to the Law School. Since petitioner is seeking to prove that he is more qualified primarily on the basis of the entry criteria, he should have the burden of proving that such criteria are valid measures of qualification.

had first hand knowledge of the relative GPA's, LSAT scores and PFYA's of the white and nonwhite law school applicants. As professional academicians and specialists in the screening of applicants, respondents certainly know that college grade point averages and scores on difficult symbolic-analytic written tests are criteria which have a severely adverse effect on nonwhite applicants.[17] Respondents must be presumed to have intended the obvious known results of their behavior. Moreover, respondents could have discontinued the use of these discriminatory criteria if they wished. Thus, this is not a case involving wholly innocent use of classifications having a discriminatory effect. The fact that respondents adopted an affirmative action program to neutralize the discriminatory effects of their entry system clearly shows that they were indeed aware that discrimination was present in the system[18] Had respondents failed to do so, minor-

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[17]The discriminatory effect of written tests of nearly all kinds has been common knowledge within the academic community for many years.

[18]Once respondents became aware that their entry system was grossly discriminatory, they had only two options. First, they could have discontinued the use of the discriminatory criteria. Second, they could have adopted a minority admission program designed to neutralize the discriminatory effects of the criteria (as they, in fact, did in this case). If this Court now prohibits respondents from following the second course of action, the result will be that respondents—and other law schools throughout the nation—will be forced to discontinue the use of educational requirements, the GPA and the LSAT as screening mechanisms. Otherwise, the law schools would be subject to suit for using exclusionary and invalid criteria. This would mean that law schools would have to resort to wholly subjective entry criteria. Until rational alternatives are available, the sensible and legally permissible approach is to allow the law schools to continue using the suspect criteria and to implement minority admission programs to neutralize their discriminatory effect.

ity applicants could plausibly have challenged their admissions program as purposefully discriminatory.

Second, this Court has repeatedly recognized that when a classification results in a virtually complete exclusion of minorities, close scrutiny is appropriate and the state must come forward with some substantial justification. *Hernandez v. Texas,* 347 U.S. 475 (1954). In this case, virtually all blacks, Chicanos and Native Americans would have been excluded and an essentially segregated Law School would have resulted if the discriminatory effect of the PFYA had not been neutralized by the minority admissions program.

Third, the right to nondiscriminatory entry into the legal profession is a preferred right which this Court is obliged to protect with extreme care. *Cf. Turner v. Fouche,* 396 U.S. 346 (1970); *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *NAACP v. Button,* 371 U.S. 415 (1963). The fundamental concept which underlies the doctrine of preferred position is that the courts have a special obligation to prevent restrictions which interfere with the free operation of the political process since, in a democracy, it is the political process to which the people must look for an adjustment of their grievances. The preferred position doctrine applies, if anywhere, precisely in cases involving restrictions on the access of minority racial groups to the political process. *United States v. Carolene Products,* 304 U.S. 144, 152 n.4 (1938).

The relief requested by petitioner would drastically restrict the access of minority groups to the legal profession, which has historically maintained a dominant position within the political process. Ever since the Constitutional Convention, lawyers have dominated the national legislature. For example, at the present time, nearly seventy percent of the members of the United States Senate and over fifty percent of the members of the House of Representatives are lawyers. "By virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." *In re Griffiths,* 413 U.S. 717, 721 (1973).

Furthermore, the rights minority races achieve through the political process will only be enforced if there are attorneys willing to do so. This Court has ruled that litigation brought to protect the civil rights of minority groups is a mode of political expression which deserves special protection because groups that are unable to achieve their objectives through the ballot frequently must turn to the courts. *NAACP v. Button,* 371 U.S. 415, 429-30 (1973). Since litigation may be the most practicable avenue open to a minority person to petition for redress of grievances, the interest racial minorities have in equal opportunity to enter law schools, and thus the legal profession, should also deserve special judicial attention. *Cf. United Transportation Union v. State Bar,* 401 U.S. 576, 585-86 (1971); *United Mine Workers v. Illinois Bar Association,* 389 U.S. 217 (1967).

Spread throughout the record in this case and throughout the legal literature is overwhelming evidence that nonwhite races (particularly blacks) have been excluded from the legal profession in drastic disproportion to their numbers in the population. Thus, although roughly eleven percent of the nation's citizens are black, approximately one percent of the nation's lawyers are black. [See discussion in §II.(D), *infra.*] The exclusion of nonwhites from the legal profession has contributed to the alienation of minority groups from the political process. So serious has the adverse effect been that the nation was forced to suffer through a series of divisive race riots in the 1960's before the scope of the problem could even be perceived by the dominant political forces.

Petitioner asks this Court to rule that law schools cannot undertake programs designed to rectify the discriminatory effects of the entry criteria that they have used and continue to use. If this request were granted, it would sharply curtail the access of the nonwhite races to the legal profession. For this reason, such a request must be subjected to especially close scrutiny in order to ensure that the preferred right of nonwhite races to nondiscriminatory entry into the legal profession is not violated.

2. The equal protection clause, interpreted in light of Griggs v. Duke Power Co., prohibits the creation of racially discriminatory barriers to employment such as those involved in this case in the absence of a showing that such barriers are job-related and justified by business necessity.

(a) ***The rule of Griggs v. Duke Power Co.: racially discriminatory barriers to employment are illegal unless they are proved to be job-related.***

In 1971, this Court handed down one of the most important decisions in the history of equal employment opportunity law, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). This case established the fundamental rule that "barriers to employment" which are racially discriminatory in their effect are prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, unless they are "shown to bear a demonstrable relationship to successful performance of the jobs for which . . . [they were] used." *Id.* at 431. As the Court stated, *"If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Id.*

Chief Justice Burger's opinion indicates that the Court's holding was based on two basic perceptions regarding the use of employment criteria. First, even where they are "fair in form," such criteria are frequently "discriminatory in operation" and act as "built-in head-winds" which prevent minority persons from obtaining equal employment opportunity. Second, many criteria which employers use to screen applicants for employment are not job related: they simply do not predict the applicant's ability to per-

form the job in question. In such cases, the use of the discriminatory criteria is not justified by any "business necessity."

Normally, in applying the rule of *Griggs v. Duke Power Co.*, the court must ask only two questions. First, are the employment criteria racially discriminatory in effect? Section I(A) *supra* of this brief shows that in this case, the answer to this question is yes. Second, are the employment criteria job-related and justified by business necessity? Section I(B) *supra* of this brief shows that in this case, the criteria are wholly invalid and unjustified. Here, however, there are two additional questions which must be asked. First, does the *Griggs* test, which was originally based upon Title VII of the Civil Rights Act of 1964, also apply by virtue of the equal protection clause to the creation of discriminatory employment barriers by state agencies? Second, is admission to law school a barrier to employment within the meaning of the *Griggs* test?

(b) *The equal protection clause prohibits state agencies from engaging in conduct which, if undertaken by private organizations, would constitute employment discrimination in violation of Griggs v. Duke Power Co.*

In its initial form, Title VII of the Civil Rights Act of 1964 did not apply to state and local governmental agencies. Therefore, not long after Title VII became effective, the question arose whether legal standards developed in Title VII cases against private employers also applied to employment discrimination cases against state agencies based upon the

equal protection clause and the Civil Rights Act of 1866, 42 U.S.C. 1981. The lower courts which have considered this issue have concluded that Title VII standards also apply to state agencies through the equal protection clause. Thus, for example, the Second Circuit, in affirming an injunction prohibiting the use of a written examination for determining promotions within the New York City School system, stated,

> [O]nce discrimination has been found it would be anomalous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). The anomoly would only be emphasized by the recent passage of the Equal Employment Opportunity Act of 1972, which broadened Title VII to include state and city public employers. *Chance v. Bd. of Examiners*, 458 F.2d 1167, 1176-77 (2d Cir. 1972).

For similar holdings, *see, e.g., Baker v. Columbus Municipal Separate School Dist.*, 462 F.2d 1112, 1114 (5th Cir. 1972); *Armstead v. Starkville Municipal Separate School Dist.*, 461 F.2d 276, 279 (5th Cir. 1972); *Castro v. Beecher*, 459 F.2d 725, 732-33 (1st Cir. 1972); *Carter v. Gallagher*, 452 F.2d 327 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972). These cases reflect the salutary principle that public agencies

should at least live up to the standards imposed on private employers.

The proposition that rules developed under Title VII apply in cases brought under the equal protection clause is fully supported by a functional analysis of the operative provisions of the two laws. Although Title VII is a lengthy statute, its operative provision reduces to a declaration that "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . employment. . . ." 42 U.S.C. § 2000e. Similarly, the equal protection clause prohibits the denial of "equal protection of the laws", a term which has been construed to mean "racial discrimination" generally. Thus, conduct which violates the general prohibition of Title VII would, if carried out by a state agency, violate the equal protection clause:

> Although differing from the present case in the respects that it was a decision under Title VII of the Civil Rights Act of 1964 and that it concerned intra-company assignment of employees by a private employer, *Griggs* construed broad statutory language proscribing classification of employees: "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . or national origin." 42 U.S.C. § 2000e-2(a)(2). With substitution of "applicants" for "employees" the quoted statutory language not unfairly describes what we hold to be the constitutional constraints on a public employer. We cannot conceive that the words of the

> Fourteenth Amendment, as it has been applied in racial cases, demand anything less. *Castro v. Beecher,* 459 F.2d 725, 733 (1st Cir. 1972).

Thus, like Title VII, the equal protection clause requires the elimination of discriminatory devices that foster racial stratification to the disadvantage of minority citizens. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), *citing with approval, Castro v. Beecher, supra; Chance v. Board of Examiners, supra.*

(c) *Since the law school's racially discriminatory entry criteria function as barriers to employment in the legal profession, the Griggs rule should be used to test their legality.*

The central fact that must be remembered is that the Law School's discriminatory entry criteria would have prevented nonwhites from entering the legal profession. Thus, even though the law school is not technically an "employer" within the meaning of Title VII, the case does involve discriminatory "barriers to employment" within the meaning of *Griggs v. Duke Power Co.* In fact, given the "preferred position" of the right of insular racial minorities to nondiscriminatory access to the legal profession, we would submit that the *Griggs* test must be strictly applied to this case, and the racially discriminatory entry criteria rejected, unless they are a necessary rather than a mere rational method to select law school applicants.

To treat this case other than as an employment case would be to ignore the realities involved. The basic function of law school is to prepare persons for

entry into the legal profession. In this sense, law school is analogous to an apprentice program for entry into other trades. Numerous cases hold that racial discrimination in the selection of apprentices is illegal even though joint apprenticeship committees are not actually "employers". These cases reflect the sound and realistic principle that discriminatory apprentice selection is just as effective a barrier to employment opportunities as discrimination by specific employers. *See, e.g., United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971); *Dobbins v. Local 212, IBEW,* 292 F.Supp. 413 (S.D. Ohio 1968). *See generally* Yeager, *Litigation Under Title VII of The Civil Rights Act of 1964, The Construction Industry and The Problem of The "Unqualified" Minority Worker,* 59 Geo.L.J. 1265, 1272-75 (1971). In other cases, the courts have held that trade associations are employers for the purposes of Title VII because their influence over and responsibility for employment practices applying to the industry as a whole is greater than any single employer. *See, e.g., United States v. Local 638, Enterprise Ass'n.,* 360 F. Supp. 979, 995 (S.D.N.Y. 1973); *Williams v. New Orleans Steamship Ass'n.,* 341 F. Supp. 613 (E.D. La. 1972). The absolute control law schools maintain over entry into the legal profession makes the analogy to these cases compelling.

Since there is simply no reason to treat this case differently from standard employment cases, the *Griggs* rule should control here. Applying that rule,

it is clear that the Law School's discriminatory entry criteria cannot be justified even under the normal "job-relation" standard, let alone the stricter standard applicable here: There is no showing of job-relatedness in the trial record, and as the discussion in I(B) *supra* demonstrates, the entry criteria are clearly not job related. Therefore, petitioner is requesting this Court to enter an order requiring respondents to take action which would directly violate the equal protection clause as interpreted in light of the *Griggs* case. Such a request must be rejected.

3. Title VI of the Civil Rights Act of 1964 prohibits the use of invalid law school admissions criteria which are discriminatory in effect.

Petitioners have correctly recognized that "[t]he University of Washington is heavily funded by federal assistance of various kinds," and is therefore subject to the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. [Petitioner's Opening Brief, at 27.] The conclusion to be drawn from this is not, however, that Petitioner was subjected to racial discrimination prohibited by the statute. To the contrary, the statute required the Law School to take affirmative action to eliminate the discriminatory effects of its previous admissions policies.

Section 601 of the Act bans discrimination on the "ground of race, color, or national origin" in any program or activity receiving federal financial assistance." 42 U.S.C. §2000d. Pursuant to the authority granted in the statute, the Department of Health, Education and Welfare promulgated non-discrimination regulations, which are set forth in 45 CFR §§80

et seq. Acceptance of federal funds by the University of Washington bound the University to comply with the Act and HEW regulations. These regulations state that a recipient "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin." 45 CFR 80.3(b)(2).[19]

As this Court recently acknowledged, the purpose of Title VI of the Civil Rights Act of 1964 was to insure that federal funds would be spent in such a manner as to aid in the elimination of the pervasive effects of racial discrimination. The Act prohibits not only deliberate discrimination, but also actions which have the *effect* of discriminating against persons of a particular race, color or national origin. *Lau v. Nichols,* 42 USLW 4165, 4167 (Jan. 21, 1974).

The use of admissions criteria which are discriminatory in effect is specifically prohibited with respect

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[19] 45 CFR 80.3(b)(2) provides:

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

to institutions of higher education. 45 CFR §§80.3 (b)(2), 80.4(d), 80.5(c).[20] The Law School used the PFYA as the primary criterion in the admission of students, and, as we have shown above, inflexible application of this standard would be severely discriminatory in effect. Since inflexible application of the Law School's ordinary admissions standards would have violated Title VI as interpreted by these regulations, the Law School was required to take affirmative action to neutralize the discriminatory effect of its admissions criteria. Recent federal amendments to the regulations confirm the Law School's obligation under Title VI to take neutralizing action. They state that when a program is administered in such a way as to discriminate against minorities, affirmative steps must be taken to overcome the effects of prior discrimination.

More specifically, § 80.3 of the new regulations provides at (b)(1)(6)(i) that

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[20] 45 CFR §80.4(d):

(d) Assurances from institutions. (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for a special training project, for a student loan program, or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

45 CFR §80.5(c):

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

> In administering a program regarding which the recipient has *previously discriminated* against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.[21]
>
> 38 Fed. Reg. 17979 (July 5, 1973)

The explanatory statements accompanying the amendments indicate that this section was added to clarify a recipient's obligations under the Act. Section 80.3(b)(6) was added to *require* funded programs to take affirmative steps to overcome the effects of prior discrimination and to indicate that recipients are not prohibited from taking affirmative action "to overcome the effects of conditions which resulted in limited program participation by persons of a particular race, color, or national origin," 38 Fed. Reg. 17978 (July 5, 1973). The illustrative applications also added to the regulations make it clear that affirmative action is clearly intended to mean that special consideration will be given to minority applicants. For instance, amended section 80.5(i) provides that it may be necessary for a recipient to make "selections which will insure that groups previously subjected to discrimination are adequately served." 38 Fed. Reg. at 17980-81. Section 80.5(j) provides that even if a recipient has never used discriminatory policies, it

[21]The second section of 80.3(b)(6) states that a recipient of federal funds "may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin . . ." even if it has not engaged in prior discrimination.

"may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served." 38 Fed. Reg. at 17981.

Since Title VI, as implemented by federal regulations, required the University to take affirmative action to remedy the discriminatory effects of its admissions policy, it is irrelevant that there was no judicial finding that its prior admissions policies were illegally discriminatory. The regulations specify that the Act bars unjustified exclusion of minorities from institutions of higher education even when the discriminatory impact is unintended.

This Court recently held that discrimination in effect burdening national origin minority children violates Title VI. *Lau v. Nichols*, 42 USLW at 4167. *Lau* dealt with a policy, nondiscriminatory on its face, that discriminated in practice against Asian children. Similarly, in the instant case, the Law School's former admissions criteria, while purporting to treat all applicants alike, seriously discriminated against minority applicants. Just as this Court required the school system to take neutralizing action in *Lau* to overcome the language barrier, so here the neutralizing action taken by the Law School—the special admissions program—must be upheld. The regulations implementing Title VI contain explicit directives defining affirmative steps recipients should voluntarily undertake to prevent illegal discrimination and rectify the effects of past discrimination. The Law School has taken such steps. This Court should

thus defer to HEW's construction of the statute on this point,[22] and uphold the Law School's policies.

In this case, it would be particularly anomalous to hold that affirmative action taken by the University of Washington Law School is unjustified. The Law School's admissions process is governed directly by Title VI and indirectly by the rule in *Griggs v. Duke Power Co.* Both Title VI and Title VII as construed by the courts and administrative agencies include strong prohibitions on unexplained de facto discriminations against minority groups. In *Griggs* and *Lau,* this Court upheld this construction of these two statutes. Both statutes also include potent affirmative action requirements which can be imposed by a court or administrative agency in default of voluntary efforts at affirmative action. These provisions have also been upheld. [*See* cases cited in section II(B) *infra.*] Since the fundamental premise of both statutes is the encouragement of voluntary compliance, this Court should uphold the Law School's minority admissions policy as a valid attempt to comply with its legal obligations.

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[22]This Court has consistently given great deference to the interpretation of a statute by the officers or agency charged with its administration. *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971); *Udall v. Talman,* 380 U.S. 1, 16 (1965). The validity of an administrative regulation will be upheld if it is reasonably related to the purpose of the enabling legislation. Here, as in *Lau v. Nichols,* the applicable enabling legislation is section 601 of the Civil Rights Act of 1964. It should be noted that these interpretative regulations are uniform rules which have been adopted by every federal agency which extends federal financial assistance.

B. The Law School's use of the minority admissions program to remedy the discriminatory effects of its entry criteria was a constitutionally permissible exercise of its discretion.

1. Racial classifications can be used to remedy past and present racial discrimination.

In repeatedly characterizing this case as a minority preference case, petitioner totally overlooks the fact that the so-called "special privilege" involved here is nothing more than a neutralizing of the racially discriminatory effect of entry criteria which in the past caused an almost complete segregation of the Law School, and which would still do so without the minority admissions program. There are literally hundreds of cases which support the proposition that racial classifications can be used in order to provide a remedy for prior and continuing discrimination burdening minority groups.[23] Since this case involves the use of a racial classification by a public agency, we will limit our citations to cases in which public agencies were ordered to use racial classifications to remedy the effects of their past and present discrimination. *See, e.g., Carter v. Gallagher,* 452 F.2d 327 (8th Cir.) *(en banc), cert. denied,* 406 U.S. 950 (1972); *Castro v. Beecher,* 459 F.2d 727 (1st Cir. 1972); *Pennsylvania v. O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *modified en banc,* 473 F.2d 1029 (3d Cir. 1973); *Bridgeport Guardians v. Bridgeport Civil Service Commission,* 482 F.2d 1333 (2d Cir. 1973); *Vulcan Society v. Civil Service Commission,* 6 E.P.D.

[23] The courts have, in fact, held that racial classifications may be mandatory if necessary to prevent racial discrimination. *See, e.g., Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968).

¶ 8974 (2d Cir. 1973); *Coffey v. Braddy,* No. 71-44-Civ.-J (M.D. Fla., August 12, 1971); *NAACP v. Allen,* 340 F. Supp. 703 (M.D. Ala. 1972); *Hogue v. Bach,* No. C-3693 (D. Colo. 1972); *Shield Club v. City of Cleveland,* 5 E.P.D. ¶ 8406 (N.D. Ohio 1972); *Pennsylvania v. Sebastian,* No. 72-987 (W.D. Pa., Nov. 20, 1972), *aff'd by order* (3d Cir., June 7, 1973); *Davis v. County of Los Angeles,* 73-63-WPG (C.D. Cal., July 20, 1973); *Erie Human Relations Commission v. Tullio,* 360 F. Supp. 628 (W.D. Pa. 1973); *Arnold v. Ballard,* 6 E.P.D. ¶ 8675 (N.D. Ohio 1973); *NAACP v. Civil Service Commission of San Francisco,* 6 E.P.D. ¶ 8956 (N.D. Cal. 1973); *Western Addition Community Organization v. Alioto,* 6 E.P.D. ¶ 8959 (N.D. Cal. 1973).

The implicit rationale of these cases is that racial classifications which are used to rectify racial discrimination and achieve equality are obviously not denials of the equal protection of the laws. In each of these cases the court imposed a hiring ratio establishing minimum percentages for the employment of minority applicants. Every case acknowledged that such a remedy would impose short-term burdens on some competing whites, and that applicants from specific minority groups would be given special consideration. Nevertheless, this special consideration given to minority aspirants did not transgress the rights of competing whites to equal protection of the laws.

2. Public agencies may take reasonable actions to rectify their own discriminatory practices without a judicial finding of illegal discrimination.

Although in most instances the remedies imposed in the above cited cases were ordered after a judicial finding of illegal discrimination, the law does not restrict the use of remedial racial classifications to situations where such findings have been made. In *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) this Court stated that, although the judicial power to remedy the effects of discrimination rests on a finding of statutory or constitutional violation, other government agencies have the authority to take affirmative action to remedy the effects of state policies that are discriminatory in fact, even in the absence of a specific finding of prior racial discrimination. As the Court put it:

> School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; . . . 402 U.S. at 16.

Consistent with *Swann,* the court in *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 6 E.P.D. ¶ 8993 (1st Cir., November 30, 1973) recently upheld a voluntarily adopted affirmative action program, stating that:

> [P]ublic authorities have a broader discretionary power to remedy past discrimination than that of the judicial branch. *Id.* at 13.

The statements by the courts in *Swann* and *Altshuler* confirm the fundamental legal principle that public agencies have constitutional authority to enact affirmative policies that will ensure equal treatment, even though there may be no prior finding of illegal discrimination. *Cf. Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966). *See also, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

Further support for this fundamental principle can be found in two other lines of cases. The first is a series of cases upholding affirmative action programs adopted by federal and state agencies. The second is the enormous body of Title VII and equal protection clause cases in which consent agreements have been approved by district courts in the absence of specific findings concerning discrimination.

In a series of cases the courts have upheld affirmative action plans that set hiring goals or ratios for minority tradesmen in state or federally financed construction projects. Although these plans require that contractors give special consideration to minority groups when making hiring decisions, they have been consistently upheld against challenges on equal protection grounds. None of the plans was predicated on a specific finding of past illegal discrimination by contractors.[24] Each plan was designed to rectify the

[24]While each of these plans was adopted after an administrative finding that minority tradesmen were significantly underrepresented on construction projects, such a finding was no more than what was

racial imbalance then existing on construction projects, and the reviewing courts recognized that this interest was sufficiently important to justify the "color conscious" solution. For instance, in *Associated General Contractors of Massachusetts, Inc. v. Altshuler,* 6 E.P.D. ¶ 8993 (1st Cir. Nov. 30, 1973), the court said:

> It is by now well understood . . . that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequities make new opportunities less accessible. *Id.* at 11.

See, Contractor's Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.) *cert. denied,* 404 U.S. 854 (1971); *Southern Illinois Builders Association v. Ogilvie,* 327 F. Supp. 1154 (S.D. Ill. 1971) *aff'd* 471 F.2d 680, 684 (7th Cir. 1972); *Joyce v. McCrane,* 320 F. Supp. 1284 (D. N.J. 1970); *Weiner v. Cuyohoga Community College District,* 19 Ohio 2d 35, 249 N.E.2d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (1970). *Cf. Brooks v. Beto,* 366 F.2d 1 (5th Cir. 1966); *Porcelli v. Titus,* 431 F.2d 1254 (3d Cir. 1970).

Each of these cases is materially indistinguishable from the present action. The Law School has recognized the crucial need to alleviate the underrepresen-

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patently obvious to the University of Washington Law School, i.e., the almost total exclusion of racial minorities from its own student body as well as from the legal profession.

tation of minority lawyers in the legal profession and to neutralize the exclusionary effects of its traditional admissions criteria. It responded appropriately. The Law School modified its admissions policies in an attempt to remedy these evils.

A further indication that public agencies may rectify their discriminatory practices without a judicial finding of illegal discrimination can be found in the judicial approval of consent agreements which require an employer to use racial hiring ratios to eliminate the effects of discrimination. *See, e.g., Penn. v. Stumph,* C-69-239-06JCL (N.D. Cal., Dec. 20, 1973); *Emeryville Citizens for Better Government v. Neary,* C-71-940 CBR (N.D. Cal., Oct. 26, 1973); *NAACP v. Imperial County Irrigation District,* No. 60-302-GT (S.D. Cal. 1972); *Martinez v. Grand Rapids Civil Service Board,* No. G-178-72, 6 Clr. Hs. Rev. 685 (W.D. Mich., Jan. 22, 1973); *United States v. Operating Engineers, Local 3,* C-71-1277 RFP (N.D. Cal. 1973).

In each of these cases, most of which involved public agencies, the parties consented to hiring ratios without any judicial finding that the employer's hiring policies were in fact illegally discriminatory. Evidence that the challenged hiring procedures seriously disadvantaged minority applicants was deemed sufficient to justify judicial approval. Likewise, in the present action, the severe disadvantage caused to minority applicants by the Law School's entry criteria should justify its adoption of a program designed to rectify that disadvantage.

3. A decision not to allow public agencies substantial discretion to rectify their discriminatory practices would be a decision to perpetuate such practices.

The importance of preserving and encouraging the authority of public agencies to remedy present and past discrimination cannot be overemphasized. For decades, the Executive Branch has attempted to eliminate racial discrimination in employment through affirmative action requirements in its federal contracts. *See, e.g.,* Executive Order 11246. More recently, affirmative action programs have been adopted by federal, state, and local agencies throughout the country to remedy the effect of racial discrimination in employment, admissions to schools, housing, the distribution of teachers and students within schools, and many other areas. The discretion of these agencies to adopt and implement such programs must be encouraged if equal treatment for racial minorities in our society is ever to become a reality. Restriction of this discretion would not only slow progress in civil rights to a snail's pace, but would in fact result in the perpetuation of past discrimination.

A further effect of restricting the discretion of public agencies would be to impose an enormous burden on the already overburdened judicial system. It would result in the bringing of a large number of lawsuits which are wholly unnecessary since many agencies are willing to rectify their own discriminatory practices without a court order. Moreover, those agencies which are willing to take affirmative action to rectify the effects of their discriminatory practices are better equipped than the courts to determine the

specific causes of the discrimination and the best means to compensate for it. This is the reason courts ordinarily grant substantial deference to the judgment of the executive and legislative branches. We suggest that such deference is fully appropriate here.

The Constitution mandates equal protection, not color blindness. Measures, such as those adopted by the Law School, which seek to promote, rather than to deny equal treatment, should not be deemed illegally discriminatory. Fruend, *Constitutional Dilemmas,* 45 B.U.L. Rev. 13, 20 (1965). As shown above §§B(2),(3) *supra,* Congress, in both Title VI and Title VII of the Civil Rights Act of 1964, has condemned unexplained and unjustified discriminations burdening racial minorities. These statutes also express a strong Congressional commitment to the principle of voluntary compliance and the necessity for affirmative action aimed at eliminating the effects of past and present discrimination. This Court has given extraordinary deference to Congress' judgment about the need to enact such measures in order to secure equal protection. *Cf. Katzenbach v. Morgan,* 384 U.S. 641 (1966). *See also United States v. Guest,* 383 U.S. 745 (1966); *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964). Thus, Congress retains broad authority to enact laws designed to correct conditions perceived to involve a denial of equality or other fourteenth amendment rights; the Court defers to the presumed need for a remedy, without requiring a showing of actual discrimination. By the same token, state agencies should retain authority to prescribe remedies to implement the guarantees of the four-

teenth amendment and federal antidiscrimination legislation, even though there has been no specific judicial finding that these laws have been violated.

C. The traditional presumption of unconstitutionality does not apply to an ameliorative racial classification challenged as a discrimination burdening whites.

In the foregoing portions of this brief, we have demonstrated (1) that it is wholly incorrect to characterize this case as one involving preference or special privileges for nonwhite persons, (2) that indeed it is petitioner who asks this Court to grant an illegal preference for whites over nonwhites and (3) that the racial classification does not involve the granting of a preference since it is used solely to remedy the adverse impact of the Law School's entry criteria on nonwhites. In this section of the brief we will assume solely for purposes of argument that the Law School's minority admissions program does grant a "preference" to nonwhites and therefore involves a discrimination burdening some whites, and we will show that, even if this were so, it would be fully constitutional. The fundamental proposition on which this argument rests is that the racial classification in this case is not the type of suspect racial classification to which the presumption of unconstitutionality applies. Consequently, the Court should not require the Law School to demonstrate that the admissions program is necessary to achieve a compelling state interest. Rather, a less strict standard of review is appropriate. Since the minority admissions program is a rational means to achieve a legitimate state interest, it is wholly legal.

This Court has traditionally applied a strong presumption of unconstitutionality to classifications that are challenged as discriminating against, excluding, stigmatizing or otherwise burdening certain groups that need special judicial protection. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 192 (1964); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). This presumption is founded upon the indisputable premise that racial classifications have been used in the past mainly to the detriment of minority groups that have been victimized by state sanctioned discrimination and relegated to a position of political impotence. Were it not for the extraordinary protection afforded by the judiciary through the presumption of unconstitutionality ordinarily applied to racial classifications, these groups would have no possible way to redress their legitimate grievances. When, however, the complaint is that whites are burdened by government action which makes racial distinctions in order to ameliorate burdens suffered by members of a minority race, the traditional rationale for stringent review does not apply. For the reasons discussed below, the presumption of unconstitutionality is unwarranted in this case.

1. The minority admissions program does not burden a minority group traditionally subjected to private and public discrimination.

The major purpose of the fourteenth amendment was to safeguard blacks against discriminatory state laws. *Palmer v. Thompson,* 403 U.S. 217 (1971); *Strauder v. West Virginia,* 100 U.S. 303 (1880);

Slaughter-House Cases, 83 U.S. 36 (1873). Consistent with this purpose, a basic function of the presumption of unconstitutionality has been to protect groups that have historically been victims of private prejudice and animosity from invidious legislation directed against them. *Cf. Hernandez v. Texas*, 347 U.S. 475, 478 (1954). Racial classifications, when they have been used, all too often have reflected historic prejudices, rather than legislative rationality. Their purpose has virtually always been the preservation of white supremacy and the subjugation of minority groups into an inferior civil status. Their effect has virtually always been to stigmatize and degrade the minority group. Thus, the judiciary, as the guardian of individual rights, has closely scrutinized racial classifications.

This heightened judicial sensitivity has been particularly necessary because invidious racial classifications have so often been facially neutral: much racial legislation has been ostensibly evenhanded, but on closer view, has stigmatized, subjugated, and damaged only the minority group. *See, e.g., Wright v. Council of the City of Emporia*, 407 U.S. 451, 461 (1972); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). Because even supposedly neutral racial classifications used by the state frequently invidiously discriminate against minority groups, the Court has properly shifted to the state the burden of justifying the use of these classifications.

The white majority, however, does not need this protection. It has not been subjected to historic discrimination or victimized by private prejudice. Affirmative action programs such as the Law School's minority admissions policy obviously do not stem from racial antipathy, and their purpose is not to oppress any racial group. Furthermore, such special consideration given minority applicants does not compound the burdens imposed by the historical legacy of slavery, segregation and discrimination. This is not a classification that seizes on a group that has historically suffered discrimination and which relies on this past discrimination as an excuse for heaping on additional disadvantages. Instead it seeks to alleviate these burdens. *Cf. Gruenwald v. Gardner,* 309 F.2d 591 (2d Cir.), *cert. denied,* 393 U.S. 982 (1968).

2. The minority admissions program does not burden politically powerless insular minorities.

Another function of strict equal protection review has been to protect politically weak minority groups from class distinctions directed against them through the majoritarian political system. Recently, the Court noted that one of the traditional indicia of suspectness is that the class is "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process" *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973). Potential abuse of the legislative process by the majority has been a crucial factor that has invited close judicial scrutiny of legislation that may discriminate against "discrete and insular" minorities

which are relatively powerless to protect their interests by resort to the political branches. *Graham v. Richardson,* 403 U.S. 365, 372 (1971).

Discrimination burdening insular minorities will not evoke the political response that the majority can rely upon to protect its interests from invidious legislation. *United States v. Carolene Products,* 304 U.S. 144, 153 at n.4 (1938). Further, when a minority group complains that it is peculiarly damaged by certain legislation, the judiciary must listen closely because the minority did not have a hand in making the decisions involved. Indeed, a foundation for the illegality of segregation laws is that they are imposed on "the group that is not dominant politically, and therefore, does not make the choice involved." Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1, 33 (1959). Often, therefore, the judicial branch has offered minority groups their only hope for redressing their legitimate grievances.

Thus, this Court has found that heightened judicial solicitude is appropriate when reviewing legislation affecting aliens, who are unable to vote [*Graham v. Richardson,* 403 U.S. 365 (1971)], blacks, who have historically been excluded from the political process [*Nixon v. Herndon,* 273 U.S. 536 (1927); *Gaston County v. United States,* 395 U.S. 285 (1966)], and women, who face pervasive discrimination in the political arena, [*Frontiero v. Richardson,* 411 U.S. 677, 685 n.17 (1973) (plurality)]. Consequently, when the political or administrative process has oppressed

protected minority groups, denied them equal treatment, or ignored their needs, the judiciary has taken an active role in safeguarding the minority from the depredations of the majority, *Hunter v. Erickson,* 393 U.S. 389 (1969). In contrast, the deference the Court affords most economic and social regulatory legislation is largely attributable to the simple fact that the interest groups that are burdened have "more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams,* 397 U.S. 471, 520 (1970) (dissenting opinion).

As Justice Powell put it in a recent case in which the Court refused to extend further the concept of suspect classes:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

Thus, when racial classifications are used amelioratively to rectify the effects of discrimination, as in the present case, the rationale for extraordinary judicial protection is inapplicable. The white majority has much less need for an alert judiciary that will guard it from invidious official action. The majority no more needs judicial protection from a law school admissions program assisting minority groups than

it needs to be protected from a special admissions program for foreign students, military veterans, the poor or the physically handicapped.[21]

As the Court stated in *Hunter v. Erickson,* in striking down an ordinance requiring antidiscrimination laws to be approved by referendum, "the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination, and if it did, a referendum might be bothersome, but no more than that." 393 U.S. 389, 391 (1969). The majority can, any time it feels that a governmental affirmative action program involves sacrifices it is unwilling to undertake, resort to the political process to obtain a remedy.

3. The minority admissions program cannot be presumed to stigmatize racial minorities.

Petitioner and several amici have argued that the Law School's minority admissions program will stig-

[21]The only element the challenged racial classification has in common with the classifications this Court has found presumptively unconstitutional is that an immutable trait, race, is the basis of the classification. However, this Court has never ruled that classification based on immutable traits are presumptively unconstitutional. *See, e.g., Labine v. Vincent,* 401 U.S. 532 (1971); *Levy v. Louisiana,* 391 U.S. 69 (1968). Moreover, in this instance race is in fact a relevant, and indeed a necessary, method of classification. *Cf. Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). There is therefore no reason to presume that this classification is manifestly arbitrary and unreasonable. Race may be the most rational way to classify when seeking to ensure against, rather than promote, discrimination. *Swann v. Charlotte-Mecklenburg Board of Education, supra; Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968). *Springfield School Committee v. Barksdale,* 348 F.2d 261 (1st Cir. 1965). Since race is being used only as an effective measure to ameliorate discrimination in this case, there is no reason to presume that the classification is arbitrary and unreasonable.

matize minority students. In a fortunately bygone era, this Court described the white perception of blacks as: "... . beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect . . . a stigma of deepest degradation was fixed upon the whole race." *Scott v. Sanford* 60 U.S. 393 (1857).

In the day of *Dred Scott* the races were kept separate because blacks were considered "beings of an inferior order" and not fit to associate with the white race. The petitioner now stands the stigma rationale on its head and implies that the integration of what would otherwise be a virtually segregated law school through a minority admissions program will stigmatize black law students and lawyers with a stamp of inferiority. Minority students should not be foreclosed from a legal education simply because of the possibility that some whites might misunderstand the reasons for, and functions of, a minority admissions program.[25] A belief that minority lawyers are stigmatized solely because they are minorities and may have attended law school under the minority admissions program can only stem from racial prejudice which

[25]The assumption that students admitted through the minority admissions program are unqualified is totally erroneous. The Law School accepted no unqualified minority applicants; only those applicants "whose records indicated that they were capable of successfully completing the Law School program" were admitted. Any suspicion someone might harbor that these students are unqualified will quickly be dispelled since by the time these minority students are admitted to practice, they will have successfully completed the same curriculum as their white colleagues.

this Court should not condone. Traditionally law schools have had special admissions programs which give special consideration to veterans, the physically handicapped, and persons from various geographical areas. Not only have these students not been stigmatized, they have not been distinguished in any manner from the student body at large. If minority students are perceived any differently, racial prejudice can be the only explanation. The realistic view is that minority races would be stigmatized even more if there were only a few minority students allowed in law schools, and if there continue to be few minority lawyers.

Moreover, if the image conveyed by a minority admissions program is a social and psychological burden, it burdens minority students, not whites. As the potential victims of this burden, members of these groups are best able to evaluate the risks and decide whether they are willing to assume them. The notion that minority law students and lawyers will be burdened by a minority admissions policy is especially ironic when one considers that special admissions programs, which now exist in law schools throughout the country, in most cases were established and survive with strong support from minority students and the minority bar.

Since there is little danger that state policy seeking to assist minority groups will become oppressive and invidious if the judiciary does not closely safeguard the rights of the majority, there is no reason for adhering to the presumption of unconstitutional-

ity traditionally applied in other cases involving racial classifications. Of course, this does not mean the total abandonment of judicial review in cases such as this. It only means that the Court should not require the Law School to demonstrate that its minority admissions program is necessary to the achievement of a compelling state interest. Under the applicable standard of review, the rational basis test, it is clear that the minority admissions program is constitutionally permissible. *See* Sec. I(C), *supra.* Indeed, as the following discussion will establish, the minority admissions program is supported by a compelling state interest.

D. Even if a compelling state interest is the standard by which the University's actions are to be measured, the University had such an interest.

Even if this Court should reject each of the arguments presented in the foregoing sections of this brief, and characterize the racial classification in this case as suspect, we would contend that the Law School's admissions program is justified by a compelling state interest.[26] Indeed, the admissions policy is justified by probably the single most important domestic interest: the need to establish and maintain racial harmony among the people of the United States. During the 1960's racial tension throughout the nation

[26]We recognize that this Court may in this case apply a standard of review less stringent than the compelling state interest test, yet require a stronger showing of the rationality of the classification and the strength of the interest served than is ordinarily demanded by the rational basis test. However, we will show that the Law School's admissions policy passes muster under the compelling State interest analysis, as well as any less rigorous standard of review.

exploded into prominence as the single most dangerous, destructive and intractable domestic problem facing this nation. The Law School's minority admissions program represents an attempt to respond to this fundamental issue.

In civilized nations governments are established in large part to secure the peaceful resolution of clashes between conflicting individuals and interest groups. The legal system, in particular, is assigned the fundamental task of ensuring that conflicts are resolved in a peaceful manner. When entire racial groups are systematically excluded from positions within the legal system, the result is easy to predict. The excluded group will feel alienated from the system, and its legitimacy decreased in their eyes. They will perceive that the system suppresses them, and responds fairly only to the dominant racial group. Bell, *Racism in American Courts, Cause for Black Disruption or Despair?* 61 Calif. L. Rev. 165, 174-84 (1973). Ultimately, this diminution of perceived legitimacy can only result in resort to direct action by excluded groups outside the legal and political system to secure a forum for their demands and concerns.

At this time in history, it seems particularly ironic to argue before this Court that the State of Washington does not have a compelling interest in the development of programs designed to overcome the exclusion of the nonwhite races from the legal profession. The interests involved are precisely the most fundamental interests of all state and local

governments. Individuals may differ about the specific steps that should be taken in the pursuit of these fundamental and compelling governmental interests, but it takes a substantial degree of blindness to argue that the interest does not exist.

Of course, judicial review of suspect classifications is not exhausted by a showing of a compelling need for some governmental action. It must also be shown that the classification is a rational means to achieve that interest, and does not impose unnecessary burdens. Even within these strict limits, however, the state's action in this case is constitutional, since there is no alternative available to the state for integrating the legal profession other than by ensuring that minorities are trained for the profession at the state law schools. Thus, even if the racial classification involved in this case is reviewed under this Court's most stringent standard, the minority admissions program still meets this test. This was the finding of the Washington Supreme Court, and it is wholly correct.

Petitioner has taken the position that the Supreme Court of the State of Washington was in error in characterizing the need for additional minority law students and, ultimately, attorneys, as a compelling state interest. He has incorrectly characterized the Law School's interest in increasing the number of minority lawyers as stemming primarily from the belief that minority lawyers provide better representation for minority clients. Phrased this way, petitioner's view of the problem is too narrow. In

many individual lawyer-client relationships the race of the lawyer is undoubtedly irrelevant, but it can hardly be disputed that the rights of minority groups will be better protected if there are more minority attorneys. This is especially true in those situations in which racial discrimination is involved, or in cases in which it might be unpopular for white attorneys to represent minority clients.

The national need for minority lawyers goes far beyond whatever need minority clients have to be represented by attorneys of their own race. It is the *sine qua non,* extensively documented by the Kerner Commission in 1968 [Report of the National Advisory Commission on Civil Disorders 283-88], of full integration at every level of society, because it concerns access to positions of political and economic power where policy-making and the decisional process affect the lives of all citizens. Those cases that have come before the Court in the areas of school desegregation, employment and public accommodations, as well as the extensive civil rights legislation of the last ten years, have all been directed toward bringing about a fully integrated society. Other cases involving reapportionment, voting rights and jury selection have been recognized by the Court as affecting the ability of minorities to obtain a fair parity of political and economic power in our society.

As we have argued earlier, the legal profession plays a critical role in the public and private policy-making sectors of our society. *See* §II(A)(1), *supra.* Yet, minorities are vastly underrepresented

in these sectors. Among the nation's approximately 300,000 lawyers, roughly 4,000—less than 1½ percent —are black. There are only 16 blacks in the House of Representatives and one in the Senate. Significantly, over 40 percent of these black legislators are lawyers. On the basis of evidence such as that provided by the record in this case relating to the University of Washington Law School's past admissions' practices, without a minority admissions program racial minorities may never be fully integrated into the legal profession or the major policy-making positions in this society.

The Supreme Court of the State of Washington found that there were compelling educational reasons for having a racially integrated law school student body. The University recognized, as has this Court, that an all white law school damages not only minorities, it also harms white students who are deprived of the benefits of a racially integrated learning experience. *Cf. Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). This Court recognized the educational benefits of a racially integrated law school in *Sweatt v. Painter*, 339 U.S. 629 (1950) in which the Court, said:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, could choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. *Id.* at 634.

Racial isolation in law school can only buttress racial prejudices and stereotypes which will be carried over into professional life. The legal profession can little afford lawyers who have been isolated from other races, other cultures, and other ideas.

CONCLUSION

For the reasons set out above, as well as those stated by the Respondents and other *amici* in support of their position, the decision below should be affirmed.

Dated, Oakland, California,
January 29, 1974.

Respectfully submitted,

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No. 73-235

FILED

FEB 4 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARCO DEFUNIS, et al.,
Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, et al.,
Respondents.

Upon Certiorari from the Judgment of the Supreme Court of Washington

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BRIEF FOR AMERICAN INDIAN LAW STUDENTS ASSOCIATION, INC. AND AMERICAN INDIAN LAWYERS ASSOCIATION, INC., AMICI CURIAE

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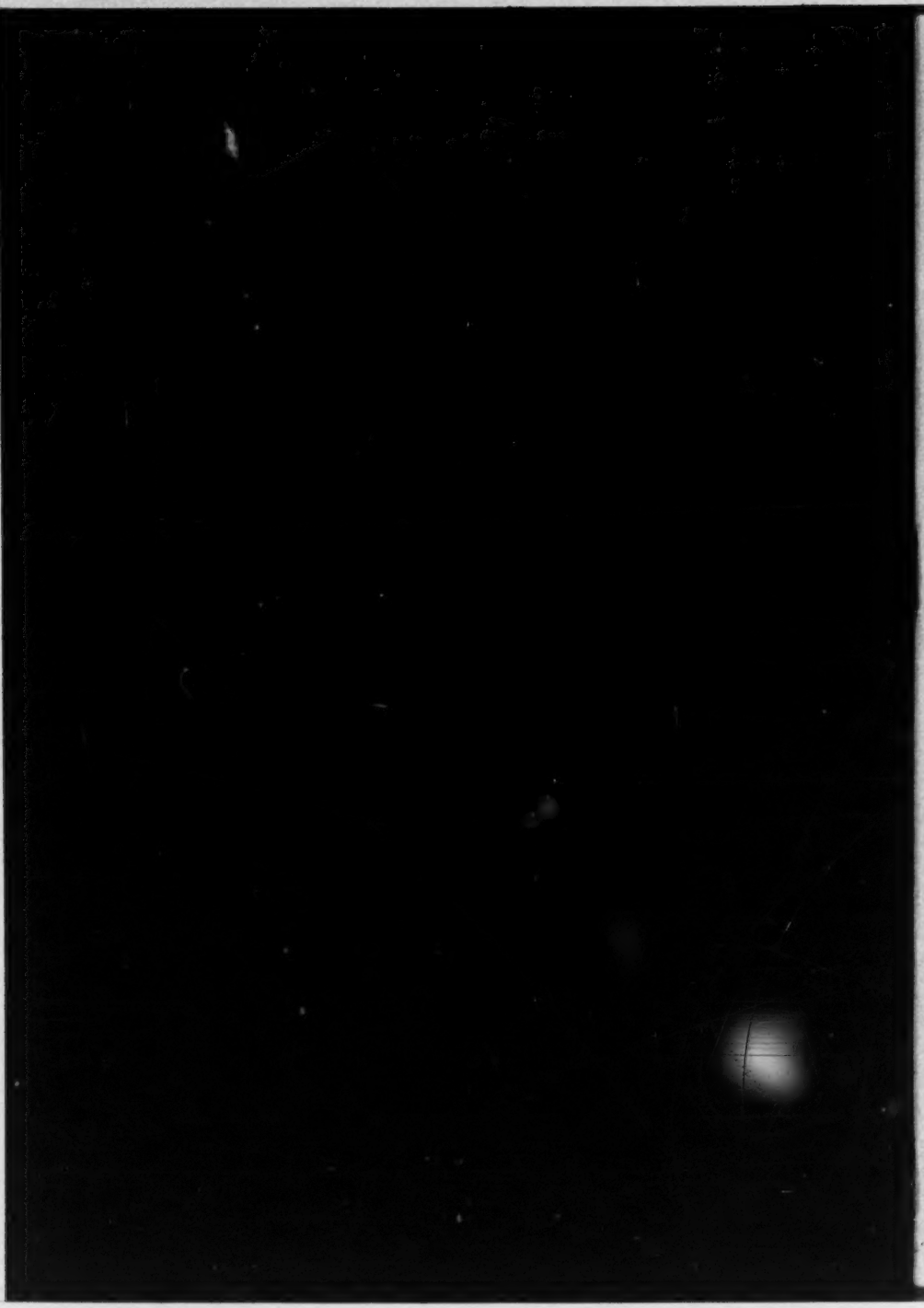

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, et al.,
Petitioners,

v.

CHARLES ODEGAARD, President of the
University of Washington, et al.,
Respondents.

Upon Certiorari from the Judgment of the Supreme Court of Washington

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BRIEF FOR AMERICAN INDIAN LAW STUDENTS ASSOCIATION, INC. AND AMERICAN INDIAN LAWYERS ASSOCIATION, INC., AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is submitted with consent of counsel for the parties on behalf of the American Indian Law Students Association, Inc., and the American Indian Lawyers Association, Inc.

The American Indian Law Students Association, Inc. and the American Indian Lawyers Association, Inc. are non-profit organizations whose membership consists solely of Indian lawyers and law students. The combined organizations have over 200 members representing over 40 different Indian tribes. The outcome of this case could drastically affect the number of Indians who will be admitted into law schools in the future which will directly jeopardize the progress that Indians are now making in the courts. Members of both organizations strongly support minority admission programs in law school because of the tangible benefits that Indians and Indian tribes have received as a result of the dramatic increase in Indian lawyers over the last five years. In light of the recent stated policies of Congress, the Courts and the President for increased Indian self-determination, Amici believe that an ever greater number of Indian lawyers are needed to insure that these promises do not prove to be empty like so many other promises in this nation's history. A determination that law schools can not maintain special minority admission programs will close the doors of law schools to America's most disadvantaged minority.

STATEMENT OF THE CASE

We adopt in full as the statement of the case the opinion of the Washington Supreme Court as set forth in *DeFunis v. Odegaard*, 82 Wn. 2d 11, 507 P.2d 1169, 1171-1177 (1973).

I

ARGUMENT

THE SCHOOL OF LAW MUST BE ALLOWED TO CONSIDER CRITERIA OTHER THAN MECHANICALLY DERIVED TESTS AND SCORES IF THE LEGAL PROFESSION IS TO BECOME HETEROGENEOUS.

The government of this country is basically one designed and run by lawyers. Of the three branches of government, both state and federal, almost the entire judiciary is composed of lawyers, while lawyers predom-

inate in the legislative and executive branches. See Martin Mayer, *The Lawyers*, Dell Publishing Co., 1966. Thus in all serious disputes between individuals and groups in our society, at least one lawyer is inevitably present whether resolution of such a dispute should occur in a courtroom, in the halls of the legislature, in the administrative process or simply in negotitaion. We strongly believe that a minority admission program for law schools is needed if Indians are to obtain adequate representation in the legal profession. The University of Washington, School of Law has pursued a commendable course of action in trying to serve our society as a whole and the minority communities individually by admitting qualified students from all sectors, although not all meet the standard mechanical criteria. The Washington Supreme Court points out, 507 P.2d 1169 at 1185, that while race was a major factor, it was not the only factor considered by the committee in reviewing minority applications. The Court further noted that the dean of the law school testified in the trial court that only "qualified" minorities were admitted.

Amici strongly support the concept and goal of the University of Washington that the best qualified students be accepted. But qualifications are a mixture of many things. We believe that mechanical testing devices of grades and test scores simply do not adequately measure the qualifications of an American Indian for a law school class; other considerations, including intangibles, must be considered. The point has been put in bald terms:

> "(F)ew persons have any confidence in the validity of a culture-bound test for measuring innate intelligence and most tests of mental ability are agreed to be culture-bound (especially those of the group variety)." L. Coombs, *The Educational Disadvantage of the American Indian Student* 83 (1970).

Several other studies have reached the same conclusion, both in regard to grades and standardized tests.[1]

While Amici believe that cultural bias does exist in LSATs, we also recognize the need for a minimum level of performance in grades and LSATs for admission to law schools. Although this may bar Indians who may have the native intelligence to achieve success in law school but low scores from attending school, it is a recognition that law school and the practice of law is culturally alien to Indian students. To force Indians who have not acquired all of the skills of the white culture, however, to match or better non-minority students on the same tests is an unnecessarily herculean task that few Indians can achieve. In this connection, Amici would like to draw the Court's attention to Appendix A which shows the rate of success in completing law school and being admitted to the bar that Indian students have had over the last five years. The majority of these students had LSATs and GPAs lower than the average of non-minority students, yet they were able to successfully complete their studies and are now working in Indian communities. Unless measures such as those of the University of Washington's

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[1] Perhaps the leading study on the educational performance of American Indians has been conducted by Dr. Robert J. Havighurst on behalf of the United States Office of Education. Dr. Havighurst concluded that performance of Indians in white classrooms is primarily determined, not by "innate intelligence", but by socio-economic factors including the life-style and language of the tribal culture, extreme poverty, geographical isolation, and the inability of white teachers ("excellent" through the same teachers may be with white students) to interact well with Indian students. R. Havighurst, *Education of Indian Children and Youth* 22-24, United States Office of Education (1970). See also, e.g., Berry, *The Education of American Indians* 23, published by the Special Subcommittee on Indian Education (1969); Crossland, *Minority Access To College* 62 (1971); and K. Anderson et al., *The Educational Achievement of Indian Children*, United States Department of Interior, Bureau of Indian Affairs (1953). See also, O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 Tol. L. Rev. 281 (1970).

minority admissions programs are encouraged, or at least permitted to continue, then minorities perforce have to delay until the next generation, or the generation after that, their taking an equal place not only in the legal profession but also in our society as a whole.

II

THE SCHOOL OF LAW'S MINORITY ADMISSION PROGRAM IS DIRECTED TOWARD THE COMMENDABLE GOAL OF PRODUCING MORE INDIAN LAWYERS.

The history of the relationship between Indian people and the federal and state governments is unique among the law of nations. As this Court said in *United States v. Kagama*:

> "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."
> 118 U.S. 375, 381 (1886)

This anomalous and complex relationship has been primarily a legal relationship. The legal status of Indians and Indian tribes has been a continuing issue since the discovery of the New World. *See*, e.g., Victoria, De Indis et De Jure Belli Relectiones 1 (Trans. by John Pawley Bates 1917), 1557. The United States from the signing of the first treaty with the Delaware Indians in 1778 (Treaty of September 17, 1778, 7 Stat. 13), to the present day has recognized separate legal rights and disabilities for Indians and Indian tribes. Throughout the history of the United States there has been a tripartite struggle for power over Indians between the Federal government, the states, and Indian tribes. While the degree of power of each entity has vacillated[2] the end result has been a massive and complex body of cases, statutes and treaties that

[2] Compare *United States v. Bailey* 24 F.Cas. 937 (No. 14, 495) (c.c. Tenn. 1834) and *State v. Doxtater* 47 Wis. 278, 2 N.W. 439 (1879) which appear to suggest that there is a presumption of State jurisdiction with *Kennerly v. District Court*, 400 U.S. 423 (1971) and *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685 (1965). See also *The Indian Battle for Self-Determination*, 58 Cal.L.Rev. 445 (1970).

deal with Indians and Indian tribes.[3] In addition Indians have been blessed and burdened with one of the oldest and largest federal bureaucracies in existence, the Bureau of Indian Affairs. That agency, whose duty is to "protect" Indian interests, has until recently viewed its actions as immune from judicial relief.[4] While that relief is more than welcome, it also serves to expand involvement of Indian tribes and individuals with the non-Indian legal system.

In facing this staggering legal complexity, Indian tribes and individuals have been compelled to be represented, if at all, by lawyers who are largely unfamiliar with their systems of government and their customs and traditions, and who do not and cannot identify with and understand their clients' interests completely. This desparate shortage of Indian lawyers has been widely recognized:

> "Although no segment of our society more needs representation within the legal profession than the American Indian, no group has fewer lawyers. There are well over a half-million Indians. To achieve proportionate representation at the bar, five-hundred to a thousand Indians would have to be lawyers; yet there are perhaps not more than two dozen practicing lawyers who identify as Indian in the entire United States. The number who are actively engaged in work affecting Indians is even less." T. Christopher and F. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 Toledo L.Rev. 691, 692-93.[5]

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[3] Merely to scratch the surface of the truth of this statement, we will advise the Court that, as long ago as 1942, there were no fewer than 4,264 statutes and 389 treaties dealing with Indians, F. Cohen, *Federal Indian Law* 457 (1942).

[4] See, e.g., *Tooanippah v. Hickel*, 397 U.S. 598 (1970); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); *Pyramid Lake Tribe v. Morton*, 354 F.Supp. 252 (D.C.D.C. 1972).

[5] See also, Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 Toledo L. Rev. 847, 861-62; Note, *The Indian: The Forgotten American*, 81 Harv.L.Rev. 1818, 1833, n. 122 (1968).

While Indian tribes and individuals have at times received adequate legal representation from non-Indian lawyers, even the best of non-Indian lawyers is incapable of meeting certain long unsatisfied needs of Indian people. A successful attorney-client relationship requires more than legal skills and knowledge on the part of the lawyer and an ability to pay on the part of the client; it requires open communication and trust. A non-Indian lawyer and his Indian clients must surmount obstacles resulting not only from their oftentimes different languages, and economic positions, but they also must each overcome their own hesitancies to deal openly with members of another race and another culture. In addition to being able to communicate with and elicit the trust of his Indian clients more easily, an Indian lawyer has certain advantages that a non-Indian is unlikely to have in representing Indian clients. First, an Indian lawyer, as an Indian, will share a community of interest with his client and his client's legal problems that a non-Indian is incapable of obtaining. Second, an Indian lawyer in representing members of his community or the tribe itself will be more accountable to his clients than his non-Indian counterpart, for the non-Indian can always abandon the reservation for white society and forget the Indian world exists, while to the Indian it is home and family. Conversely, the Indian lawyer is far more likely to want to live on a geographically isolated reservation than is a non-Indian and thus is more likely to acquire the necessary expertise in Indian law and to provide the continuity of legal services so necessary to his clients. Fourth, an Indian lawyer will have the advantage of having grown up in the Indian world while having acquired his formal education in the white world. Thus at the outset of his practice he will be able to communicate and translate the viewpoints of both the Indian and the non-Indian worlds to the other without having to undergo the time-consuming learning process a non-Indian must. Fifth, an Indian lawyer who has grown up with the reservation system and has developed a feel for its practical aspects, will presumably develop a practical expertise in Indian law more quickly than the non-Indian. Sixth, the Indian lawyer will know the needs of the Indian community; he will be able to diagnose, and aggressively

pursue, the type of litigation that will most benefit the Indian people in both the long and the short term. Finally, an increase in the number of Indian lawyers will develop pride within the Indian community and will be a step toward the much-acclaimed goal of "self-determination."[6]

In the attainment of this latter goal, the need for Indian lawyers is crucial. Since the landmark case of *Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) to the present there has been a persistent recognition of tribal rights of internal self-government subject only to the dictates of Congress. In the last term, this Court in *McClanahan v. State Tax Commission of Arizona* 411 U.S. 164 (1973) reaffirmed Indian tribes' rights of self-government and the concurrent rights that Indians have as American citizens and citizens of the states. *See also Williams v. Lee*, 358 U.S. 217 (1959); *Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969). However, as the power of tribes to determine their own affairs has continued, Congress has determined that the management and control of the internal tribal affairs must meet certain prescribed standards that are foreign to tribal society. The Civil Rights Act of 1968[7] is the most obvious example of this process. Prior to the passage of that Act, Congress had not imposed restraints similar to the Bill of Rights on tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896); *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta v. Ogala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958). While it may be that the standards tribal governments must not meet are not identical to the constitutional restraints imposed on the federal and state governments, it is nevertheless true that the imposition of those standards will have an impact on tribal society that has yet to be fully known. In *McCurdy v. Steele* 353 F. Supp. 629, 632-33 (1973) the court noted that:

> "The Indian Civil Rights Act appears to have been tailored by Congress to the purpose of enhancing the

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[6] See, e.g., President Richard M. Nixon, *Message to Congress*, July 8, 1970.

[7] Act of April 11, 1968, 82 Stat. 77, 25 U.S.C. § 1301 et seq.

civil liberties of individual Indians without unduly undermining Indian self-government and cultural autonomy. The law incorporates guarantees found in the Bill of Rights with regard to certain basic liberties including due process, equal protection, free exercise of religion, freedom of speech and safeguards during criminal proceedings. But the Senate committee deleted restrictions contained in the proposed statute upon the establishment of religion and the use of racial voting classifications when it appeared that the first restriction would undermine Indian theocracies and the second would undermine tribal cultural autonomy generally. Furthermore, the record suggests some concern at least that those guarantees incorporated by the Indian Civil Rights Act not be unduly disruptive of tribal culture. It would thus appear that the Indian Civil Rights Act is properly considered in the context of federal concern for Indian self-government and cultural autonomy: Its guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy."

Harmonizing these three values will be a difficult and extremely delicate task not only for the federal judiciary, but also for tribal councils and tribal courts. Unless there are Indian lawyers available to help perform this task, then the goal for self-determination and viable tribal governments will become ever more impossible to achieve.

III

RACE IS A CONSTITUTIONALLY PERMISSIBLE CLASSIFICATION FOR AMERICAN INDIANS.

The Washington Supreme Court has determined that racial classifications are not unconstitutional per se. 507 P. Rp. 2d 1169, 1178-1181. Indians have been constitutionally classified by race throughout the history of the United States. Congress has enacted a comprehensive statutory scheme in Title 25 of the United States Code and elsewhere which deals with almost every aspect of a res-

ervation Indian's life — matters of education,[8] health,[9] civil liberties,[10] welfare,[11] transfers of land,[12] validity of contracts,[13] testamentary disposition,[14] and expenditures of tribal funds.[15] All of these statutes involve explicit classifications by race;[16] none have for that reason been held violative of the Fifth Amendment. There are numberless other statutes and regulations dealing solely with Indians, including a hiring preference for Indians in the Bureau of Indian Affairs, a federal agency.[17]

The federal government under the due process clause of the Fifth Amendment has no "lesser duty" than the states do under the equal protection clause of the Fourteenth Amendment to avoid the practice of invidious discrimination on the basis of race. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Nevertheless Congress has since the inception of this country enacted a multitude of statutes conferring burdens and benefits on persons solely on the

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[8] See, e.g., 25 U.S.C. §§ 13, 297.

[9] See, e.g., 25 U.S.C. §§ 231, permitting entry upon reservations to enforce health regulations.

[10] See, e.g., 25 U.S.C. §§ 1301-03.

[11] See, e.g., 25 U.S.C. §§ 305-309 (a).

[12] See, e.g., 25 U.S.C. §§ 348, 391, 393.

[13] See, e.g., 25 U.S.C. §§ 81, 82, 82(a), 84, limiting contracts without the apporval of the Secretary of the Interior.

[14] See, e.g., 25 U.S.C. §§ 371-80, which requires the approval of the Secretary of Interior in regard to many testamentary dispositions.

[15] See, e.g., 25 U.S.C. § 122.

[16] Cf. *United States v. Rogers* 45 U.S. (4 How.) 567 (1846).

[17] 25 U.S.C. § 472. This Court has granted certiorari in *Mancari v. Morton* 359 F.Supp. 585 (D.C.D.N.M., 1973) to determine whether the Indian Preference statutes, 25 U.S.C. §§ 44-46, and 472 were amended by the Civil Rights Acts of 1964 and 1972, 42 U.S.C. §§ 2000 et seq. and Public Law 92-261.

basis of their Indian race. The constitutionality of those statutes against the claim of racial discrimination has rarely been questioned, and in all cases has been upheld. As the Court said in *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 (E.D. Wash. 1966):

> "Indeed if legislation is to deal with Indians at all, the very reference to them implies the use of a 'criterion of race.' Indians can only be defined by their race."

This Court has explicitly affirmed the case of *Simmons v. Eagle Seelatsee, supra*, which held that a federal statute prohibiting the inheritance of trust property from an Indian by a white person is not an invidious racial discrimination. 384 U.S. 209 (1966). *See also Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). To now hold that a similar classification by a state runs afoul of the Fourteenth Amendment jeopardizes the entire scheme Congress has enacted in its exercise of power over Indian tribes and individuals. In *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court held that the Fourteenth Amendment did not confer citizenship rights on Indians maintaining tribal relations; it was not until 1924, more than half a century after the Fourteenth Amendment took effect, that Congress finally granted all Indians born in this country the rights of citizenship.[18] It would indeed be a bitter irony for this Court to hold that the Fourteenth Amendment now bars special admissions in law schools for Indian students when the University of Washington is so clearly serving a national purpose.

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[18] 8 U.S.C. § 3.

IV

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Washington Supreme Court should be affirmed and the case be dismissed.

Dated: January 31, 1974

HERBERT BECKER
BARBARA A. FIX
BRUCE R. GREENE
FRED L. RAGSDALE

By:
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APPENDIX A

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January 28, 1974

Honorable Justices
Supreme Court of the United States
Washington, D.C.

Dear Justices:

I have been asked by the American Indian Law Students Association and the American Indian Lawyers Association to provide some figures in respect to Indian attendance in law schools in the United States and their practice of law upon graduation.

The Special Scholarship Program in Law for American Indians provides living stipend assistance to almost all Indian law students while they are in school. Participants in the program attend law schools throughout the United States. The program is a relatively new one in that it has only been operational since 1967. Since that time there have been four (4) graduating classes from law schools. Our figures show that there have been 86 Indian students

who have entered law schools and, in the normal three (3) years it takes to complete studies for a law degree, 57 have graduated, for a completion of 67%. Most of these Indian students had lower GPAs and LSATs on entering law school than the average law school admittees. Of the 57 who have graduated, there are currently 54 who are working in areas directly affecting the Indian population or in Indian related fields. This means that 95% of our graduates are closely involved in Indian affairs. Six (6) of the 57 students graduated at the end of the first semester 1973, and have yet to take a bar examination. Of the 51 graduates who have taken a bar exam, 37 have been admitted to practice, for a 73% bar examination success rate. We are confident that those who were unsuccessful in taking their first bar examination will meet with more success on their next attempt.

The figures cited above are indicators of many things. First and foremost of these is the fact shown that if an Indian student is given the opportunity to enter law school, there is an excellent chance that he or she will graduate from law school. This success rate of 67% is quite comparable to the national law school average as reported in the American Bar Association Journal February 1972, Volume 58, page 147. These figures also indicate the strong commitment of Indian law school graduates to the Indian people and their rights. Finally, I believe these figures show that if an Indian student is given the opportunity to enter law school he or she will graduate, and upon graduation the chances are excellent that he or she will gain admission to the practice of law and ultimately serve the interests of his or her people.

Respectfully,

s/Philip S. De Loria
PHILIP S. DE LORIA
Director, Special Student Scholarship Program in Law or American Indians

PSD: ls

AFFIDAVIT OF SERVICE BY MAIL

Yvonne Romero, being duly sworn, deposes and says:

I am a citizen of the United States, over 18 years of age and employed in the County of San Diego, California. I served the Brief for American Indian Law Students Association, Inc. and American Indian Lawyers Association, Inc., Amici Curiae by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 1974 at Escondido, California.

Yvonne Romero

YVONNE ROMERO

Subscribed and sworn to before me this 2d day of February, 1974 at Escondido, California.

Barbara A. Fix

NOTARY PUBLIC

OFFICIAL SEAL
BARBARA A. FIX
NOTARY-PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires August 21, 1976

FEB 4 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DE FUNIS, *et al.*, *Petitioners*,

v.

CHARLES ODEGAARD, *et al.*, *Respondents*.

BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AMICUS CURIAE

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MARCO DE FUNIS, *et al.*, *Petitioners*,

v.

CHARLES ODEGAARD, *et al.*, *Respondents*.

BRIEF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS AMICUS CURIAE

OPINIONS BELOW

The opinions of the Supreme Court of Washington are reported at 82 Wn.2d 11, 570 P.2d 1169, and are reprinted as Appendix A to the Jurisdictional Statement or in the Alternative Petition for Certiorari.

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3). Certiorari was granted on 19 November 1973.

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires that state law school admissions be based solely on quantitative predictions as to academic success in the first year of law school, that is, based solely on college grades and Law School Admission Test (LSAT) scores?

2. Is it constitutionally permissible for a state law school to utilize as criteria for selection, among qualified applicants to study law, factors such as the applicant's race, sex, work experience, prior military experience and other background for the purpose of improving the quality of the legal education of all its students and producing graduates better able to communicate effectively with minority groups in our society?

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the Constitution of the United States provides:

> "... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSENT TO FILING

This Amicus Curiae brief is being filed with the consent of all parties to the proceeding.

INTEREST OF THE AMICUS CURIAE

The Association of American Law Schools consists of 127 of the 152 schools accredited by the American Bar Association. Its purpose and function are the

exchange of ideas about substantive law, methods of teaching and administration of law schools with a view to the improvement of the quality of legal education. It operates both as a central point for such exchange and as a repository of information about legal education and engages in activities seeking to improve the quality of legal education. Its interest in this case rests on its perception of the issues raised as they affect the quality of legal education and the practicalities of operating an admissions policy in an era of limited spaces and increasing applications. For this reason, we leave the particular facts in this case to the briefs of the parties, and deal here with the general situation in legal education.

STATEMENT OF THE SITUATION IN LEGAL EDUCATION

Number of Applications

Last year there were 121,262 potential applicants to law school who took the LSAT. Of these, 106,970 registered in the Law School Data Assembly Service (LSDAS; the centralized transcript analysis service operated for the law schools by Educational Testing Service); 81,913 of these completed their LSDAS applications. This suggests that about 82,000 persons completed their applications to law school. Of these 82,000 applicants, probably over 70,000 would be considered qualified in terms of quantitative predictors of success in law school. 37,018 were enrolled in one of the ABA approved law schools. This suggests that there were nearly two qualified applicants for each available seat in law schools in the fall, 1973 entering class. As a result, for the first time in the history of United States legal education every accredited law school denied admission to applicants whom it considered qualified for the study of law.

Approved law schools are now receiving from five to over twenty times as many applications as they have spaces. The average number of schools to which a LSDAS registrant has reports sent was 4.06; this means that the 152 ABA approved law schools collectively processed nearly 350,000 applications for admission to the fall 1973 entering class. All approved law schools find themselves in the position of having a very large group of *qualified* applicants and selecting from them a smaller group of students. This unprecedented admissions situation presents a number of educational and public issues, of which the present case is one example. A detailed individual inventory of the strengths and weaknesses of each applicant for good performance in law school, much less in the practice of law, is simply not administratively possible for every applicant. Thus individual non-quantitative analysis tends to be reserved for portions of the total group of applicants.

The Quantitative Factors

All legal educators know that the quantitative measures can predict performance on law school examinations only on a crude level. This is particularly true because the LSAT was developed about 25 years ago for the purpose of selecting out at the bottom the applicants who were not qualified to do law school work. With the great increase in applicants in recent years, the problem has become entirely different. The law school admission officers today have to select from a group, all of whose members are well qualified. It is not known whether the Law School Admission Test has any real statistical ability to select accurately from among many applicants, all of whom have the minimum qualities. Law school admission officers have

long felt the need to take other factors into account in selecting from among applicants. To talk of quantitative predictions of "success" in the first year of law school or in law school for the three years (by which is meant grade average) is to discuss a range of probabilities of school "success." Correlations of combined LSAT and college grade averages with "success" in law school runs at about .20 to .70, with the average for 99 schools being .42 in the latest compilation of validities. This means, of course, that other factors are also playing an important role in "success" in law school (See Brief of Law School Admissions Council). Factors such as motivation and diligence on the part of the student, and the quality of instruction afforded by the faculty, are probably of equal importance to the quantitative measures.

To state categorically, therefore, that the higher the combined LSAT and college grade average is, the "better qualified" the applicant necessarily is even for law school "success," is clearly unwarranted, for this factor deals with rough probabilities and not certainties in individual cases.

To equate law school success with success in practice is also a dangerous proposition, for law school education, as it now exists, is best geared to training in the analytical and research skills required of practitioners. It does not, as yet, train adequately in the skills of advocacy, counselling, drafting, negotiation, client relations, fact investigation and preparation which are also of prime importance in practice. Nor do these skills involve the same aspects of intellectual capacity as the analytical skills. Capacity for these skills is not built into the LSAT, although other activities of the applicants may tend to predict the existence of capac-

ity for one or more of them. Nor does the LSAT score or college grade average pick up the factors of judgment, professionalism or ethics. The quantitative predictors, in view of the range of skills needed by a practitioner, are simply not good enough to be the sole basis for admission to law school. Most schools, therefore, use them somewhat as the University of Washington did—virtually automatic admission at the very top, virtually automatic rejection at the very bottom, with other factors operative in the middle.

Other Factors

The factors most commonly and traditionally used by law schools in admissions, in addition to the quantitative, are the appraisals of the applicant by his prior teachers, his extra-curricular record, the work or military experience of the applicant, the college he attended, his geographical residence and the status of the student or his family as alumni of the law school or university. Sex in some law schools was a discriminatory factor against women in the past, both in terms of complete exclusion and in terms of requirement for better credentials. It is not used to create preferential status for a female applicant, although for a short while in some schools there was such a preference. Minority race was an exclusionary factor in some schools in the past. In more recent years, it has operated to create a preferential status to some degree in almost all law schools as have residence, letters of recommendation, evaluation of the college of the applicant, "alumnus" status, and the like. As the number of blacks and members of other minority groups applying to law schools has increased and as applicants have reflected the opportunities for better preparatory

education opened to them by the decisions of this Court, the total number of black students presently admitted to law schools has increased to 7,601. Like the applicants at the University of Washington, they are qualified for success in law school without remedial work. Seventeen of the thirty-seven minority applicants admitted to the University of Washington held roughly as high or higher quantitative credentials as those of the plaintiff in this case. Twenty were somewhat lower, but still qualified.

Quality legal education, as this Court knows, involves discussion and understanding not only of the technical rules of law but also (1) the process by which law is created and applied at the administrative, legislative and judicial levels and (2) the functions law and particular laws serve in our society. Since an understanding of process and function necessarily involves an understanding of the value structures of a heterogenous society and a rounded perception of fact patterns and situations, it is obvious that exposure to differing values and differing fact perceptions is of great value in the educational process. The color of a man's skin in our society still leads to the kinds of prior experience which result in differing perceptions of fact, for we can perceive "fact" only through the lenses of our own prior experience and training. So, too, sex differences result in differential perceptions. These two categories, normally constitutionally suspect, are also categories whose use is essential to the creation of a law school class which can see and walk around and understand legal problems and solutions in the round. They are as important differential lens providers as poverty or wealth, urban, rural or small town, veteran or non-veteran, athlete or spectator or

any other factor which adds to the overall group consciousness and diversity of experience. We are a diverse society and our perception of legal problems and our production of solutions will be the better the more comprehensive our perception of the underlying facts becomes. This roundedness of perception can be most effectively done, except for the truly sensitive and empathetic person, by the presence in the classroom and school of different colors and sexes as well as different cultural and economic backgrounds. The presence of some minority students is, therefore, an asset in the legal education of all of the students. Recognition of this fact is one important reason for inclusion in law school of qualified minority students who, on quantitative measures, may be lower than white students.

The other important reason for assuring the presence of qualified minority students in law schools is that law schools are the sole points of entry to the bar in all but two states. Minority law consumers frequently are able to relate better to a member of their own race and are sometimes unwilling to confide in a member of another race and, therefore, do not utilize our legal system. However irrational some may perceive this minority to be in its attitudes, the attitudes are a fact of life which the legal structure of our country must face. Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him. Communication with counsel is not only cognitive in nature; it also contains much which is affective. A woman talks to another woman differ-

ently and often communicates more than when she talks to a man, however trusted. The same is true of a black talking to a black, a Mexican-American talking to a Mexican-American and so on. Increasing the number of minority attorneys for these reasons is the other major factor in a law school decision to give consideration to the factor of race.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT STATE LAW SCHOOL ADMISSIONS BE BASED SOLELY ON QUANTITATIVE PREDICTIONS OF SUCCESS IN THE FIRST YEAR OF LAW SCHOOL.

In all but constitutionally suspect categories this Court has traditionally recognized that few classifications by a state run afoul of the Equal Protection Clause (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911)), and has consistently refused to intrude in areas in which it should defer to the judgment of state authorities unless that judgment is clearly capricious. *Dandridge* v. *Williams*, 397 U.S. 471 (1970). When the state demonstrates a rational basis for the classification it has adopted, the Court's scrutiny under equal protection ends. For a state law school to decide that it will not base its admissions policy solely on LSAT scores and college grade averages is clearly rational and does not violate any standard of equal protection. Cf. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

The quantitative admission predictions (LSAT scores and college grades) used by law schools are deficient in several respects as sole criteria for admission.

Charles E. Consalus, Program Director of the LSAT, writing in 1970 University of Toledo Law Review 513, states that:

> The standard error of measurement for the LSAT is 30 points either way from the "true" score. For example, an earned score of 500 (on a 200 to 800 scale), indicates that there are two chances out of three that the "true" score lies somewhere between 470 and 530. Or stated differently, there is one chance in three that the person's true ability as measured by the test, will actually fall outside this range.
>
> Another limitation concerns the imperfect ability of the LSAT to predict first year law school grades with precision. The coefficient of correlation between test scores and grades usually ranges from 0.30 to 0.50. This coefficient is an index for expressing the degree of relationship observed between two sets of measures for the same group. A −1.00 is a perfect negative correlation, zero indicates no correlation, and a +1.00 shows a perfect positive correlation. While the correlation coefficient for the LSAT may be considered low by some, it appears to be acceptable to the user schools which understand that it is extremely difficult to differentiate between individuals in a group of highly qualified, homogeneous applicants for admission. Furthermore, the LSAT has held up over the years as being about as good a single predicator of success as the undergraduate grade point average. The score and the grade point average combined are about half again as good a predicator as either alone.
>
> Finally there are variables which admit of no measurement at all by the test. A partial list would include persistence, originality, effective study habits, self-discipline, and motivation.

Perhaps of equal significance to law schools is the fact that the quantitative predictors, such as the LSAT or college grades, can not measure the applicant's ability to develop and use lawyer skills other than the analytical. They do not pretend to. They also do not measure the contribution an individual student makes to class discussion and participation in the legal education of his fellow students. The graduate of a law school on entry into the bar makes his contribution to the community to the extent he has developed the skills involved in litigation, negotiation, drafting, counselling clients, and understanding society, its problems and possibilities for legal solution or amelioration of those problems. A law school which seeks to graduate lawyers who will be useful to the community in which they work must of necessity have a wider range of criteria for admission than the quantative predictors.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS NOT VIOLATED BY A STATE LAW SCHOOL DECISION TO USE FACTORS, INCLUDING RACE, IN ADDITION TO QUANTITATIVE PREDICTORS IN ITS SELECTION OF STUDENTS.

A. The Use of Race as a Factor in Law School Admission Is Constitutionally Permissible Because of the State Interest in Quality Legal Education and the Opening of Access to the Bar for Minority Groups.

To understand what this case is it is necessary to understand what it is not. This case does not involve a plaintiff who because of race has been severely limited, perhaps entirely foreclosed, from entering and using a state owned or supported institution. This, then, is not *Brown* v. *Board of Education of Topeka,* 347 U.S. 483 (1954) or *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961); nor is it *McLaurin* v. *Oklahoma State Regents for Higher Education,* 339

U.S. 637 (1950). The University of Washington did not establish quotas for racial minority groups, however constitutional such quotas may be. *Swann* v. *Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 16 (1971). The law School's admission purposes do not relate to maintenance of racial supremacy; *Loving* v. *Virginia,* 388 U.S. 1 (1967). The factual situations in *Hirabayashi* v. *U.S.,* 320 U.S. 81 (1943) and *Shelley* v. *Kraemer,* 334 U.S. 1 (1948) bear no relationship to the present case.

This case does involve a plaintiff who contends that equal protection forbids a law school to use race as one of a number of criteria, both objective and subjective, in evaluating which qualified applicants, of many, shall be admitted to the school's first year. Plaintiff makes this argument in the context of an entering freshman law class approximately three quarters of which are members of his own race. The other quarter of this class is of mixed racial complexion. Some of the students in that quarter of the class have higher or roughly equal quantitative analytic predictors to those of plaintiff. About twenty, although still qualified on the quantitative measures, have lower ones. The case is one where race was used in conjunction with other relevant factors to make the final decision to admit or not admit. It is permissible to use race in conjunction with other relevant factors in fulfillment of appropriate state objectives; the *Swann* case, *supra,* and *Porcelli* v. *Titus,* 431 F.2d 1254, 1257 (3d Cir. 1970) ("State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective is not necessarily a violation of the Fourteenth Amendment."); *certiorari denied,* 402 U.S. 944 (1971), exemplify this.

However, whether the admission policy of the Law School of the State of Washington must be justified by the test of "compelling" interest or simply by the test of rational basis, we submit that the interest of a state law school in using race as a factor in admission to law school is constitutionally permissible.

It should not be constitutionally impermissible for a state law school to make a serious effort to achieve diversity in its student body. The quality of legal education parallels student understanding of the ways in which law relates to society. Student perception of legal situations is conditioned by the prior experience, training, background, culture, race and sex of the student body members. A white student from a "good" undergraduate school, amply funded by a well-to-do-family, views law and society differently from the way a black student would with a similar, or different, background. The sex of a student, his or her work experience or lack of it, and the area of the country in which he was raised will provide a variety of backgrounds against which the individual law students will perceive law and the role of lawyers in society.

Law students still "live" law; we ask the Court to give judicial notice to this unique and important facet of how law students teach themselves in the context of their law school world. This was a significant part of the basis for this Court's decision in one of the leading cases involving legal education. *Sweatt* v. *Painter,* 339 U.S. 629, 634-635 (1950). In the diverse society we enjoy, law schools consider it vital for future lawyers to experience as broad a variety of perceptions as is possible in their discussion of legal problems and their solutions. It is for this reason

that law schools seek information concerning race, sex, residence, work experience and the like from applicants. It is also for this reason that law school admission officers and committees evaluate and act upon such information in making admission decisions.

Diversity in the law school student body achieves another important interest for state law schools. Law schools serve as the source of training of a bar which must satisfy the legal needs of a heterogenous society. The law student becomes a lawyer, but a lawyer who continues to be black or white, male or female and a lawyer still knowledgeable about the background of his past. These characteristics and this knowledge enable the lawyer to communicate effectively with particular kinds of law consumers having the same race, sex or background. Differences of race or sex can interfere with meaningful communication. Minority groups in our society need to be given the opportunity to be represented by persons they believe understand and relate to them—with whom they can communicate on all levels—affective as well as cognitive. The appearance of justice generated by the opportunity for such representation may be almost as important to our society as justice itself. It helps the orderly solution of disputes by legal means.

The 1967 Report of the Advisory Committee for the Minority Groups Study, 1967 *Proceedings* of the Association of American Law Schools, Part One, Section I, 160, indicates that approximately one percent of the members of the legal profession are black, although approximately eleven to twelve percent of the population of our country is black. It would appear, therefore, that some effort on the part of law schools to seek out qualified minority students is justifiable to assure

minority law consumers a sufficient number of lawyers to whom they can relate and with whom they can communicate.

The creation of such an opportunity by admission to law schools of applicants selected in part by race reaches the stature of a compelling state interest in the training of an adequate number of minority lawyers and would justify even the imposition of a quota system.

B. The Equal Protection Clause Should Not Be Used as a Constitutional Vehicle for Courts To Review the Credentials of Rejected Law School Applicants When the Result Would Be Massive Judicial Intervention Into the Complex and Difficult Admission Policies, Procedures and Judgments of the Nation's Public Law Schools.

Approximately 82,000 persons applied to the 152 schools accredited by the ABA in 1973. Those schools admitted, collectively, an entering first year class of 37,018. The University of Washington Law School received 1,601 applications for admission to its first year class beginning September, 1971. The number of available positions in that class were between 145 and 150. The admission policies and procedures for selection among the 1,601 applications to achieve a first year class which effectuates the purposes and interests of the school are described in the case below. These admission procedures are relatively typical in the law school world. The Supreme Court of Washington, in this case, described the task of selection as difficult, time consuming and requiring the exercise of careful and informed discretion.

Law schools differ greatly in their admission policies. Almost all law schools seek to have a reasonable

representation of minority students. The University of Washington Law School thought 37 ~~students~~ out of ~~145~~ 330 was reasonable. The result in other law schools ranges between about five or ten percent of their students.

Unless this Court holds that public law schools can constitutionally meet their duties to provide quality legal education and to provide lawyers to meet law consumer needs, by insisting upon broad representation in their student bodies of the various groups which make up our society, the problem of judicial enforcement of the Equal Protection Clause must be faced.

The problem exemplified in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* heavily involves the nation's courts in the operation of the nation's school affairs. This is justifiable because the Constitution requires the involvement. It does not follow that *Swann* should be equated with the present case. There is no similar clear-cut discrimination here. It is fair therefore, to look at the impact of the legal process on the University of Washington Law School in the present case, described in Anderson, *The Admissions Process in Litigation,* 15 Arizona Law Review 81, 86-115 (1973). It was very severe.

The burden on courts, if court review be required, is obvious, in view of the extraordinary number of law school applicants. Pressure by courts is also very likely to lead to adoption, by the public law schools, of delusively accurate, purely numerical standards to choose entering first year classes with corresponding danger to quality legal education and the availability of the legal system to minority law consumers.

Traditionally, law school admissions policies and procedures have been conceived and maintained by the law schools. Caution should be exercised by the Court in fashioning a new equal protection role for the nation's courts and law schools, in determining the interests admission policies should serve and in evaluating individual applications which have been approved or rejected.

The better road is to continue to leave admissions policy to the sound discretion of individual law schools. The only other way of relieving the courts of the burden of reviewing an individual applicant's credentials would be to mandate as a constitutional requirement the use of quantitative predictors as the sole criterion for admissions, despite the fact that they have limited statistical validity at best, and do not measure at all many of the qualities which are relevant for admission to law school.

CONCLUSION

This Court should not impose a constitutional requirement which would force state law schools to use only quantitative measures in the selection of students for admission to law school. Other factors, including race, should meet constitutional requirements, when properly utilized as a part of an over-all admissions system. Any other decision would create a danger of lessening the quality of legal education for all students and would have a deleterious effect on the provision of legal representation perceived as effective by minority law consumers. The determination and maintenance of an admissions policy adequate to prevent these risks should be left to the discretion of the individual law schools which are already supervised by

the American Bar Association and the Association of American Law Schools. See Section 501, Approval of Law Schools, American Bar Association, Standards and Rules of Procedure; Article 6, Association of American Law Schools Bylaws.

The judgment below should be affirmed.

Respectfully submitted,

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February 1, 1974

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IN THE

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OCTOBER TERM, 1973

No. 73-235

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v.

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BRIEF OF THE ASSOCIATION OF AMERICAN MEDICAL COLLE[illegible]ICUS CURIAE

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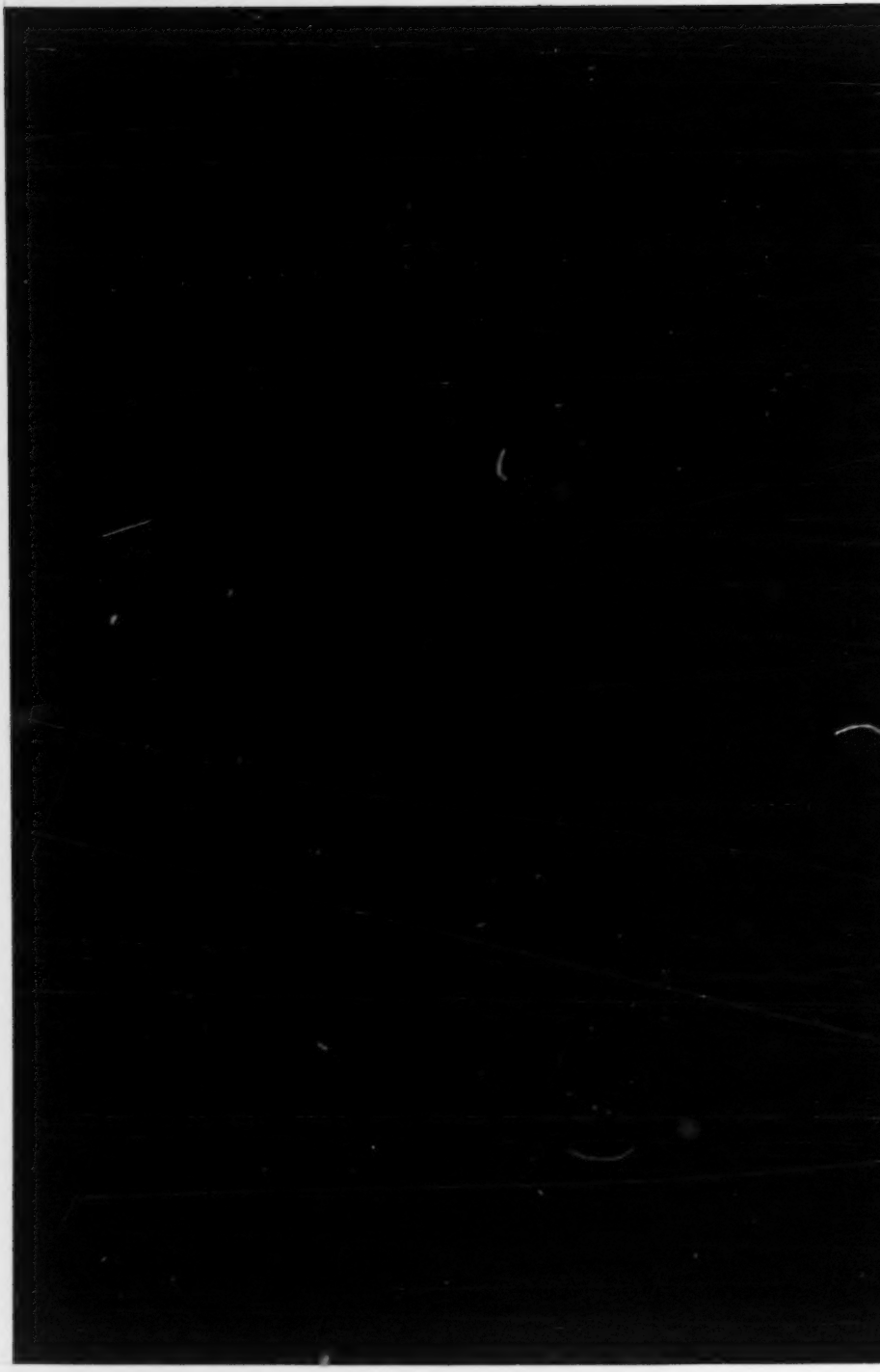

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CONSENT TO FILING

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INTEREST OF THE AMICUS CURIAE STATEMENT OF THE SITUATION IN MEDICAL EDUCATION AND ARGUMENT

The Association of American Medical Colleges includes in its membership all of the nation's 114 ac-

credited medical colleges, 52 academic societies and 400 teaching hospitals. Its purpose is the advancement of medical education. The interests of the Association and its member medical colleges parallel in nearly every respect those of the Association of American Law Schools.

The Association of American Medical Colleges associates itself with the positions stated in the brief submitted in this matter on behalf of the Association of American Law Schools and endorses the arguments set forth therein.

The judgment below should be affirmed.

Respectfully submitted,

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of the University of Washington, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE, AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, JR., *et al.*,
Petitioners,
v.
CHARLES ODEGAARD, President
of the University of Washington, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

BRIEF OF THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE, AMICUS CURIAE

INTEREST OF THE AMICUS

This case has vital importance for all colleges and universities throughout the United States. Harvard University, on whose behalf this brief is filed, is the oldest and one of the largest privately-endowed institutions of higher learning in the United States.

1. The narrowest question for decision is whether the University of Washington Law School, a State institution,

violated Petitioner DeFunis Jr.'s rights under the Equal Protection Clause by counting membership in a racial or ethnic minority as a relevant factor in admitting minority students to the first-year class. Affirmance or reversal may therefore depend upon the exact practices followed by the respondent Admissions Committee, and possibly upon other circumstances peculiar to the particular case.

The implications of any reversal would be broader, however, for higher education generally and for Harvard University in particular. Many of the constitutional propositions submitted by petitioners or *amici* as grounds for reversal would condemn a variety of admissions policies and practices. The application of the Equal Protection Clause to admissions to institutions of higher learning has been considered previously by this Court only in cases of invidious segregation connoting white supremacy. However narrow the final ruling, the case cannot be decided wisely and a constructive opinion cannot be written upon so novel yet far-reaching a question without a broad view of the educational context, comprehending not only other graduate and professional schools but especially undergraduate education.

We believe that relating Harvard's varied experience and resulting philosophy to the legal issues will help to provide the necessary perspective. We emphasize undergraduate education because no other brief seems likely to address the issue in these terms. Harvard's long experience in this area highlights the dangers of substituting an iron rule of law for the discretion of academic authorities to make a conscious selection of qualified students from the greatest variety of cultural, social and economic backgrounds in order to improve the educational experience of the whole student body.

2. Although the case may decide directly only the constitutional obligations of State institutions of higher education, its effect is bound to be broader if petitioners' contentions are sustained. Whether Harvard or another privately-endowed institution is constitutionally bound will depend upon "sifting facts and weighing circumstances" to determine the extent of government involvement in the activities of the particular institution (*Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715, 722 (1961)). See *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968); *Pennsylvania* v. *Brown*, 392 F.2d 120 (3d Cir. 1968), cert. den. 391 U.S. 921 (1968); *Robinson* v. *Davis*, 447 F.2d 753 (4th Cir. 1971), cert. den. 405 U.S. 979 (1972); *Blackburn* v. *Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971); *Browns* v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Grossner* v. *Trustees of Columbia Univ.*, 287 F. Supp. 535, 546-549 (S.D.N.Y. 1968). Compare *Guillory* v. *Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D.La. 1962) with same case on remand, 212 F. Supp. 674 (E.D.La. 1962), after upholding of vacating of temporary injunction, 306 F.2d 489 (5th Cir. 1962).

In addition, Harvard and many other privately-endowed colleges and universities receive government grants and are parties to government contracts obligating them not to exclude any person "on the ground of race, color or national origin" or to subject him or her "to discrimination under any program or activity receiving Federal financial assistance" (42 U.S.C. §2000d). The ruling in the instant case would probably govern the interpretation of these statutory and contractual obligations.

Whether legally binding or not, a decision sustaining petitioners' submission would have powerful influence throughout the world of higher education. The governing authorities of privately-endowed colleges and universities,

even in the face of their own prior educational experience and the advice of faculty and directors of admissions, would have to think long and hard before continuing to sanction admissions policies which this Court had held to be so unjustly discriminatory as to violate the Equal Protection Clause in the case of a State university.

The views expressed in this brief are those of the President and Fellows of Harvard College, a corporation more commonly known as Harvard University. They should not be understood to express the individual or collective opinions of any faculty members.

Counsel for all parties have given written consent to the filing of this brief, as shown by letters on file with the Clerk.

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause deprives the educational officers of a State University, charged with selecting a class of limited size from a larger number of qualified applicants, of discretion to give favorable weight to race or color among other indicia of diverse experience and interests as a means of improving the education of all students.

2. Whether the Equal Protection Clause deprives the educational authorities of a State University, charged with selecting a class of limited size from a larger number of qualified applicants, of discretion to give favorable weight to race or color, among other criteria, as a means of opening up educational and career opportunities, broadening a profession and facilitating the provision of professional services, to generally-disadvantaged minority groups.

SUMMARY OF ARGUMENT

I

When the applicants for admission to an entering class greatly outnumber the available places, the admissions officers must ask not only (1) does the applicant have the qualifications necessary for admission if space is available, but also (2) if qualified, should he or she be selected in preference to the other qualified candidates who must be rejected. The first question can usually be answered by reference to more-or-less objective measures of scholastic promise and accomplishment. The same or different or partially-overlapping criteria may be set up for the process of selection.

The choice of criteria for selection depends upon educational judgments concerning the quality of education the institution wishes to offer. A given institution might wish simply to select students at the highest intellectual capacity, measured by scholastic records and potential. Another institution might wish to give substantial weight to superior intellectual qualifications in filling all the places in the class — say 40 percent weight — but conclude that an equally marked superiority in other important qualities should be enough to offset them. At Harvard College experience has convinced admission authorities that if promise of high scholarship were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and the quality of the educational experience offered to all students would suffer.

The Equal Protection Clause does not impose an iron rule of "color-blindness." Prior opinions of this Court recognize that assigning minority students to a particular school in the same proportion to its student body as the minority bears to the whole population "as an educational

policy" is "within the broad discretionary powers of school authorities" (*Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)). The Equal Protection Clause looks to equal treatment of the members of the identifiable groups composing society, not to disregard of the special characteristics of their members. An admissions policy that purposefully *excludes* members of a disadvantaged minority, segregates them or limits their number, asserts their inferiority to the predominant groups and therefore constitutes "hostile" or "invidious," and unconstitutional discrimination. An admission policy that *includes* members of disadvantaged minorities in order to improve the education offered all students, carries no "hostile" or "invidious" implication. When an inclusive policy is conscientiously followed, race or color is a helpful but not invariably reliable indicator of special social, economic or cultural background and experience likely to carry their own varieties of talent, outlook and interests. The fact that race or color is only one of many highly personal characteristics used as a basis for judgment in preferring some qualified applicants over others in the inescapable process of selection helps to minimize any danger that such attention will be or be seen as "invidious."

Because giving attention to disadvantaged minority status in including minorities as a means of obtaining the diversity which raises the quality of education is not "hostile" or "invidious," it can be justified without "compelling purposes." Obviously, the distinctions thus drawn are not arbitrary or capricious. The objective of improving education for all students is permissible and non-discriminatory. The means is reasonably adapted to the objective. Should it be held that any notice of race requires a "compelling" justification, then we submit that seriously seeking to improve the non-discriminatory educational opportunities afforded all students is such a purpose.

II

Definition of community needs and choice of emphasis in filling them is a central aspect of educational policy-making at any institution of higher learning. An institution's choice of the criteria to use in the selection of an entering class from a larger number of qualified applicants will be deeply influenced by its choice of ultimate objectives. In recent years many institutions of higher education have determined that their objectives should include removing the special obstacles facing disadvantaged minority groups in access to higher education, business and professional opportunities, and professional services — obstacles which are deeply-ingrained consequences of the hostile public and private discrimination pervading the social structure. Giving favorable weight to minority status in selecting qualified students for admission is an important method of reducing these disadvantages.

Neither the pursuit of this objective nor the means adopted is beyond the scope of educational policy-making discretion under the Equal Protection Clause. The Equal Protection Clause does not prohibit all racially-conscious government activity, but only that which is "hostile" or "invidious" towards minorities without compelling justification; or which occurs in relation to a "fundamental right" without compelling justification; or which falls under the general constitutional ban against arbitrary or capricious classification. Giving an advantage in law school admissions in order to reduce the disadvantages suffered by members of minority groups long subject to pervasive discrimination, is neither "hostile" nor "invidious." Legal education is not a "fundamental right." Nor is counting membership in a disadvantaged minority arbitrary or capricious. Offsetting the disadvantages is a permissible

object of State policy. Giving favorable weight to membership in a disadvantaged minority in the process of admissions is so plainly related to reducing the disadvantages which black, chicanos, American Indians and other minorities suffer in access to higher education and career opportunities and in securing legal services as to be not only reasonable but to satisfy the "compelling interest" test.

Affirmance would establish the rule only where the inequalities of opportunity are plain beyond dispute and only in situations in which giving weight to minority status does not increase the ratio of minority students to all students significantly beyond the ratio of minority groups to the whole population from which the entering class is drawn. Nor does the case require decision upon the constitutionality of fixing specific racial, ethnic, linguistic or national quotas.

ARGUMENT

Introductory

At many institutions of higher learning as at the University of Washington Law School the volume of applications for admission so far exceeds the available places as to require the development of policies and practices for selecting some students for admission out of a much larger number who are fully qualified in the sense that they could do good work at the institution if there were room for them. Many of these colleges and graduate schools, again like the University of Washington, take some kind of cognizance of membership in a generally-disadvantaged minority group as a factor favoring selection. Here uniformity ends. Admissions policies and practices differ widely in their treatment of minorities. The criteria of selection, ur[1] .s left to chance, are related to the educational philosophy of the

particular institution, either its internal aims with respect to the character of education to be offered or its external objectives in terms of the functions it wishes to perform for society. We seek primarily to put the legal propositions advanced in support of petitioners into this broader perspective so that the Court may have full understanding of the various educational consequences.

Cognizance may be taken of minority status solely as a means of achieving the completely non-discriminatory objective of improving the educational opportunities of all students. Membership in a minority race or other disadvantaged group often imports a special background, experience and interests, so that attention to race as one of many elements in the process of selection is a step in providing diversity. As we show in Point I, experience over a long period at Harvard College has convinced the admissions officers that increasing the diversity of a student body of lively, intelligent and interesting students greatly improves the quality of their education. In the second half of Point I we state our reasons for concluding that the Equal Protection Clause does not bar giving favorable consideration to minority status as one of many factors considered in promoting diversity within the student body as a means of improving the non-discriminatory educational opportunities of all students.

Other admissions policies give favorable weight to minority status wholly or partly for the purpose of implementing the institution's choice of ultimate social objectives. In Point II we illustrate this theme but emphasize the relationship between law school admissions policies giving favorable consideration to minority groups and such broader educational objectives as opening up educational and professional opportunities which the prejudices pervading society previously closed to blacks, chicanos, Ameri-

can Indians and sometimes other minority groups. In the second part of Point II we turn again to the applicable constitutional principles and show that the Equal Protection Clause does not deny State educational authorities discretion to adopt and pursue such important objectives.

The case does not involve fixed numerical or percentage quotas. For reasons explained at pp. 42-43, 50-51, *infra*, we think that practice distinguishable and suggest that the question of fixed quotas be reserved.

I

THE ADMISSIONS OFFICERS OF A STATE UNIVERSITY MAY GIVE FAVORABLE WEIGHT TO MEMBERSHIP IN A DISADVANTAGED MINORITY GROUP AS A MEANS OF IMPROVING THE EDUCATION OF ALL STUDENTS

A. The Conscious Selection of Some Qualified Members of Minority Groups for Inclusion in a Student Body of Limited Size Improves the Educational Opportunities of All the Students.

At an institution with many more applicants than available places the admissions officers must be prepared to answer two questions:

(1) How shall they determine which applicants are "qualified" in the sense that they have sufficient ability to benefit substantially from the proposed course of study at that institution and to bring a level of intellectual capacity to the classes which does not impede other students? The question in any given instance is, "will we accept this applicant if there is room?"

(2) By what criteria shall they select from among a large number of fully-qualified applicants the much smaller number whom the institution can accommodate?

We do not imply that in practice all applications are first put through the step of winnowing out the unqualified, and that the qualified are thereafter subjected to the step of selection. In practice, some applicants will immediately appear to be qualified in the first sense and to present an outstanding case for selection in the second sense. In other instances, especially where scholarly attainment is one of the major criteria for selection, it may quickly appear that although an applicant is "qualified" in the first sense, his case for actual admission, in terms of the criteria established for selection, is far too weak to merit further consideration.

The distinction is important nonetheless, because the criteria used for determining whether an applicant is qualified must not be confused with the criteria for actual selection. At the first stage the criteria are chiefly intellectual: intelligence and aptitude tests, past academic record and previous education. Health and motivation may be minor elements. Membership in a racial or disadvantaged minority group is relevant, if at all, only in adjusting test scores and other predictors of academic success in order to compensate for correctible deficiencies in the previous experience or education of particular students. *A priori* the qualities which admissions officers at a particular institution value in making actual selections may be the same as those to which they look in determining admissibility, but they may be different or they may be overlapping. The various predictors of academic success measured by grades on examinations and assigned papers may be the best measure in judging whether an applicant possesses the school's minimum qualifications, but neither logic nor law nor sound educational policy commands exclusive use of, or even any reliance upon, the predictors in making selections from among the qualified applicants at the second stage of ad-

missions. Most institutions treat sufficiently great promise of academic success as ground for actual admission, using virtually the same predictors as are used in determining minimum qualification, but below that level such predictions may be treated as irrelevant, or the greater academic promise of one applicant may be judged less important than some quite different asset of another. The proportion of students selected because of academic promise alone differs from institution to institution. Harvard College selects about 150 students on the basis of extraordinary intellectual potential for an entering class of 1,100.

The failure to grasp this essential distinction is the source of petitioners' repeated but misleading assertion that minority applicants were preferred despite DeFunis Jr.'s superior qualifications. Petitioners' Opening Brief, pp. 2, 7. The assertion assumes that the predictors used in measuring admissibility are the only proper criteria in the process of selection. The assumption is contrary to policy and practice both at the University of Washington Law School and elsewhere.

At the stage of selection, the educational and admissions policies of any institution of higher learning should be interrelated. The criteria of selection determine the composition of the student body, which in turn seriously affects the kind and quality of educational opportunities offered to all students. Policies fixing the criteria should therefore be based upon academic decisions concerning the kinds and quality of educational opportunities the institution wishes to offer.

A given institution might wish simply to select students of the highest intellectual capacity, measured by scholastic records and potential, in the belief that it should be exclu-

sively concerned with challenging the intellect and increasing the formal learning of the student body, and with encouraging the students thus to challenge each other in these areas. Exclusive reliance on measured achievement might also be thought to introduce the highest form of equality and productive stimulus.

Another institution might conclude that education should be conceived more broadly and that, given minimum assurance of scholastic competence, all students are best served by selecting from the qualified applicants the entering class whose members have the most diverse social, economic and cultural backgrounds and the widest variety of talents and interests. In this view, diversity is a stimulus to the development of every student's personality and understanding as well as a preparation for the society in which he will live. Securing these non-discriminatory, educational objectives for the whole student body dictates evaluating a wide variety of personal characteristics, many of them utterly irrelevant in measuring ability to meet academic standards.

Still a third institution might wish to give substantial weight — say 40 percent — to superior intellectual qualifications in filling all the places in a class, but conclude that an equally marked superiority in other qualities judged to be important should be enough to offset them.

In the first case, neither race nor minority status would be relevant. In the second and third cases, membership in a minority race or other special ethnic group would be a relevant and often highly material consideration because of its significance in forming an entering class whose members will have the diverse characteristics, attachments and experience making them markedly stimulating to each other. Race, color or ethnic origin, like economic or cultural back-

ground, is one of the many characteristics that a student presents to his classmates as an individual does to the world--a characteristic which should carry neither invidious distinction nor arbitrary preference, which some treat as always and utterly irrelevant but which others may perceive as encouraging pride and a sense of identification in cultural origins and diversity without hostile connotation. Race, color and ethnic origin also tend to identify forms of special experience, social and cultural background, outlook, interests and attachments which make important contributions to a student body. This is especially true at any institution which has been predominantly white for a long period.

The foregoing general observations concerning the relationship between educational and admissions policy are drawn largely from experience at a number of Harvard schools, especially the undergraduate college. For the past 25 years Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard, and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 25 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence

and that the quality of the educational experience offered to all students would suffer. *Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid,* pp. 20 et seq. (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty — perhaps 150 or so out of an entering class of over 1,100 — the Committee seeks —

> variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College] . . . *The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.* (Dean of Admissions Fred L. Glimp, *Final Report to the Faculty of Arts and Sciences,* 65 Official Register of Harvard University No. 25, 93, 104-105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Ten or fifteen or twenty years ago, however, diversity meant students from California, New York and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that if Harvard College is to continue to offer a first-rate education to its students, minority

representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions the Committee has not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is

aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently-abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and *vice versa*. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.

The explicit emphasis put on diversity at Harvard College is greater than in other parts of Harvard University. The range of relevant diversity is probably greater in

undergraduate than graduate education; musical talent, for example, would surely be given greater weight by the Admissions Committee of Harvard College than by the committees at the Medical School or Law School. The level of intellectual promise, coupled with academic preparation, is so uniformly superior among a large number of applicants and refined differences have such relatively small importance for undergraduate education as to furnish scant basis for selection. Emphasizing a wide range of diversity, moreover, almost automatically ensures that Harvard College will help to open educational and career opportunities to young men — and through Radcliffe College, young women — from all parts of society and sections of the country.

Though the range of significant diversities may be less at some graduate or professional schools and relatively less weight may be placed upon them, all Harvard faculties recognize the educational importance of diversity of social and economic background, experience and resulting outlook in the class and seminar rooms, and in less formal discussions in the dormitories and commons. The point was well-stated in the brief filed by The Committee of Law Teachers Against Segregation in Legal Education in *Sweatt* v. *Painter*, 339 U.S. 629 (1950), as printed at 34 Minn. L. Rev. 289, 325 (1950):

> The lawyer, to meet the responsibilities of his profession, must have a vital sense of the culture of the community in which he lives and works. "Lawyers are perpetually engaged in trying to anticipate, prevent, mediate, settle or win human disagreements involving alleged rights recognized at law. Their thinking, planning and action are framed and limited by what they understand to be the prevailing principles and doctrines of law . . . " The knowledge required for these tasks can in part be obtained from books; but a major share must come from intimate knowledge of the ways of

thought of the community. "He (the lawyer) is literally lost unless he can sense the drives, interests (and weaknesses) of those with whom he deals — whether as witnesses, negotiators, judges, clients, or opponents." (footnotes omitted)

In sum, diversity within the student body is often an intermediate goal of educational policy because diversity surely may — and most experienced educators believe that it does — improve the education of all students. A hard-and-fast rule forbidding an institution to give favorable consideration to membership in a minority race or other minority group in selecting an entering class from the qualified applicants would severely constrict the freedom of academic authorities to improve the non-discriminatory educational opportunities for the whole student body.

B. The Equal Protection Clause Does Not Deny to Educational Authorities Discretion Consciously to Select Some Qualified Members of Minority Groups for a Student Body of Limited Size as a Means of Improving the Educational Opportunities of All the Students.

This Court has already affirmed in broader terms than we need advocate the right of school authorities to take account of race in forming and effectuating non-discriminatory educational policies. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971) the Chief Justice wrote for the Court —

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. . . .

The efforts of counsel to distinguish the *Charlotte-Mecklenburg* case upon the ground that "[n]o student has a Constitutional right superior to any other student to attend a particular school in the system" mistake the situation (Brief of American Jewish Congress as *Amicus Curiae*, at 16). There is no greater "constitutional right" to a law school education than there is to assignment to a particular school in a single school system. In each case the student has a very real and important interest in his or her educational objective. The disappointments and adverse consequences of assignment to be bussed to a school out of one's own neighborhood may be as serious as those of denial of admission to a particular law school, for both parents and child. In some instances, denial of admission to a State university law school may, in conjunction with other individual circumstances, block access to legal education. In either event, the question is not one of relative hardship. If attention to race or color were barred under the Equal Protection Clause by any hard-and-fast rule, it would be as unconstitutional in the one case as the other. See pp. 47-49, *infra*.

Both State and lower federal court decisions also support the discretion of school districts to make school assignments with an eye to race in the interest of fulfilling the educational purpose of introducing racial pluralism into schools where segregation *de facto* formerly prevailed. *Offerman* v. *Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *School Committee of Boston* v. *Board of Education*, 352 Mass. 693, 227 N.E. 2d 729 (1967), appeal dismissed 389 U.S. 572 (1968); *Tometz* v. *Board of Education*, 39 Ill. 2d 593, 237 N.E. 2d 498 (1968); *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *Springfield School Committee* v. *Barksdale*, 348 F. 2d 261, 266 (1st Cir. 1965); *Balaban* v. *Rubin*, 14 N.Y. 2d

193, 250 N.Y.S. 2d 281, 199 N.E. 2d 375 (1964), cert. den. 379 U.S. 881 (1964). School committees have been allowed to look to race in making faculty assignments more equitable in racial distribution. *Kemp* v. *Beasley*, 389 F. 2d 178, 187-189 (8th Cir. 1968); *Porcelli* v. *Titus*, 431 F. 2d 1254 (3d Cir. 1970), cert. den. 402 U.S. 944 (1971).

Similarly, where there has been a denial of equal employment opportunities, State agencies have been required to give favorable consideration to minority races in filling jobs that come open. *Carter* v. *Gallagher*, 452 F.2d 315, 327-331 (8th Cir. 1972), cert. den. 406 U.S. 950 (1972); *Castro* v. *Beecher*, 459 F.2d 725, 736-737 (1st Cir. 1972).[1] State agencies have been required to construct a specified high proportion of public housing units in areas of a particular racial composition. *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736 (N.D. Ill. 1969), on appeal from a subsequent order, 436 F.2d 306 (7th Cir. 1971), application for stay denied, 401 U.S. 953 (1971). To point to the prior violations of the Equal Protection Clause in order to differentiate these cases is to draw a distinction without a difference. The law is not so foolish as to order a State to remedy past violations by pursuing practices that would be unconstitutional when independently considered.

Turning from precedent to principle, three simple truths delineate the only arguable issue:

(i) The Equal Protection Clause does not forbid pursuit of a selective admissions policy at a State institution of higher education. The state is not constitutionally obliged to provide higher education for those who appear to lack the intellectual and academic qualifications necessary to

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[1] See also *United States* v. *Local Union No. 212*, 472 F. 2d 634 (6th Cir. 1973), involving remedies for a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.

benefit. Nor is a State required to find the resources to provide places in its system of higher education for everyone who does have intellectual and academic qualifications giving promise of benefit. When the number of applicants qualified to benefit from the particular course of instruction is greater than the number of places available, the institution may, because it must, select some qualified applicants and turn away others.

(ii) The Equal Protection Clause neither requires nor invites the judiciary to prescribe the standard of selection to be used by educators where the limited number of places forces them to select some qualified applicants for actual admission but to deny others despite the adequacy of their qualifications. Standards of selection that would not be constitutionally permissible in other contexts are acceptable in admissions to colleges and universities, both because the individual characteristics that may be educationally relevant are numerous and because, despite disappointments and hardships, selections must be made.[2] Nor is there anything in law, logic or educational policy that dictates use of the same standards in determining whether candidates are qualified for admission and in making actual selections. See pp. 11-14, *supra*. Petitioners' and *amici's* repeated reference to DeFunis's superior qualifications falsely as-

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[2] The necessity of selection distinguishes cases involving classification for the purpose of general regulatory legislation, *e.g.*, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967). Regulatory and criminal laws can apply equally to the whole community or to all persons engaged in defined activities. Given existing limitations of space, budget and qualified instructors, often a particular course of higher education cannot be offered to all who desire it, or even to all who are qualified to benefit. The variety of educationally relevant criteria is so great and the proper choice of criteria is so debatable that failure to adhere to a few simple and generally-accepted tests does not furnish proof of discrimination as in employment cases, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

sume some set of qualifications for actual selection which is neither established by law nor used at the University of Washington Law School.

A number of briefs urging reversal explicitly or implicitly start from the premise that "intellectual competency and capacity," proved chiefly by academic performance and intelligence or aptitude tests, is the only permissible standard for selecting students for places in a law school unable to accept all its qualified applicants. See, *e.g.*, Brief of Advocate Society et al. as Amici Curiae, at 20; Brief of Anti-Defamation League as Amicus Curiae, at 24. The use of intellectual merit as an almost exclusive standard has had enormous value in enhancing the quality of teaching and scholarship. It has been equally important in eliminating or reducing some forms of prejudice, first in higher education and then in the professions. It is surely plausible and may even be right to say that, in admissions to some kinds of graduate schools and other educational decisions, intellectual capacity and performance are still the ideal criteria even though they do less alone than when tempered with other criteria to meet the problems of racial and ethnic inequalities in access to educational and professional opportunities. Such questions are constantly under debate in higher education. That is where the debate belongs, for the issues are matters of educational policy not constitutional law. The Fourteenth Amendment does not command the use of "intellectual competency and capacity" as the sole basis of selection for admission to every institution in whose activities a State is significantly involved. Here as elsewhere in the realm of ideas, variety and experimentation are the keys to greater understanding.

The Equal Protection Clause leaves the States "a wide scope of discretion" (*McGowan* v. *Maryland*, 366 U.S. 420,

425 (1961)) especially in the realm of education. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Chief Justice spoke of "the broad discretionary powers of school authorities" in matters of "educational policy." 402 U.S. at 16. Cf. *Healey* v. *James*, 408 U.S. 169, 180 (1972); *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 507 (1969). In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973), Justice Powell referred to the "persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with informed judgments made at the state and local levels." Educational programs and the admissions policies and practices that affect them lie in the realm of ideas, where the highest importance attaches to academic freedom for both State and privately-endowed institutions. As Justice Brennan observed in *Keyishan* v. *Board of Regents*, 385 U.S. 589, 603 (1967) —

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[2a]

[2a] A prime reason for this guaranty of educational liberty was stated by Justice Douglas, dissenting in *Board of Regents* v. *Roth*, 408 U.S. 564, 581-582 (1972), quoting from an earlier concurring opinion of Justice Frankfurter in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 261-262 (1957):

> Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good — if understanding be an essential need of society — inquiries into these

(iii) It follows — putting such qualities as race or ethnic origin temporarily aside — that the Fourteenth Amendment generally permits an institution to make an applicant's probable contribution to the diversity of the student body the primary standard of selection once there is promise of satisfactory academic performance. The degree of diversity provided is directly related to the quality of educational opportunities offered, and many authorities believe it essential to an optimum program. See pp. 12-17, *supra*. Given this relationship and the necessity of choice, comparing candidates in terms of talents, outlook, experience, social, economic and cultural background and other like qualifications is within the discretion available to educational authorities under the Fourteenth Amendment even though distinctions made upon such grounds would be unconstitutional in such areas as taxation and criminal law. The constitutionality of such an approach to law school admissions was implicitly affirmed in *Sweatt* v. *Painter*, 339 U.S. 629, 634 (1950), where this Court observed —

> . . . although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

The immediate issue thus boils down to a very narrow question. Given the necessity of preferring some qualified applicants over others and the permissibility of refined

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problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

comparisons on the basis of very personal characteristics, does the Fourteenth Amendment nevertheless require admissions officers to blind themselves to what all the world knows: that the presence of members of minority races is one of the most valuable sources of diversity in any community whether large or small, general or specialized?

Plainly, the words of the Constitution do not decree this form of color-blindness. Nor should its majestic generalities be so interpreted. The policy of the Equal Protection Clause looks to equal treatment of the members of the identifiable groups composing society, not to the elimination or disregard of the special characteristics of their members. In urging that admissions committees need not be blind to the opportunities for increasing diversity among the students in a class and thus improving their education *by including students from racial and ethnic minorities*, we do not suggest that race and ethnic origin may always be used as a basis of selection. To use race, color or ethnic origin *to exclude* members of an insular minority, impose a restrictive quota or enforce segregation is patently unconstitutional. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Meredith* v. *Fair*, 305 F.2d 343 (5th Cir. 1962), cert. den. 371 U.S. 828 (1962); cf. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

It is argued that since a felt educational need for homogeneity within a classroom will not justify differentiations based upon race or color, they cannot be justified by a desire for diversity, because the one has no sounder educational claim than the other. The argument can be answered in educational terms, but the central fallacy is the assumption that the academic exclusion or segregation of minorities has the same psychological, sociological and political effects as their inclusion. In any society, the effects of

including any defined group in opportunities and benefits will be different from the consequences of their segregation or exclusion. Professor Paul A. Freund puts a simple but revealing example:

> Compare a trust fund donated to a university, the income to be used for the education of the descendants of John Hancock, and an unrelated fund for the education of anyone except those descendants. It would not be surprising if the governing board of the university felt differently about the two preferences, and judges might be animated by the same sense of justice in applying the constitutional guarantee of equal protection of the laws. (P. Freund, On Law and Justice 47 (Cambridge, 1968)).

In the United States, as a result of the long years of slavery and Jim Crow policies any admissions policy that denies admission to black students, segregates them or limits their number not only carries the vice of exclusion but asserts the supremacy of the white race and the inferiority of others; and for that reason it constitutes "hostile" or "invidious" discrimination. On the other hand, there is no danger of "invidious" or "hostile" implication, whether in purpose or effect, when a predominantly white institution counts membership in disadvantaged racial or other minority groups as a factor favoring selection for admission from otherwise qualified candidates.

The absence of "hostile" or "invidious" discrimination results from a number of factors. A policy of promoting variety by including members of minority groups along with applicants of other diverse backgrounds and talents gives relatively little weight to minority status as such. To be sure, race, color or ethnic origin is one of the characteristics a student presents to his fellows as a man does to the world, and among those of limited experience a difference in these respects may arouse irrational prejudices that it is a function of education to dissipate. The real signifi-

cance of minority status for admissions officers concerned with providing a richly diverse student body, however, is that it is a useful although not invariably reliable indicator of a kind of special social, economic or cultural background for which they are looking because it is likely to carry its own important varieties of experience, perception, talent, outlook and interests.

In addition, minority status is only one of many personal characteristics considered when the admissions officers' aim is to secure diversity among the students selected for admission. This context helps further to minimize any danger of invidious connotation. Preferring a black applicant from an urban area over a middle-class, suburban white applicant comes to have no different connotation from preferring a poet to a chemist, an Alaskan to a Bostonian, or a chicano raised in migrant labor camps to an applicant of Puerto Rican birth raised in New York, in each case because the class lacked students in one category and had ample in the other.

Giving favorable attention to minority status in opening the doors to higher education to minority groups has the incidental effect of partially offsetting the severe inequalities in education and educational opportunities from which generally-disadvantaged minorities currently suffer. This point need not be advanced, however, to sustain the use of minority status as a factor which favors the admission of qualified minority applicants but is to be weighed among other indicia of applicants' diversely stimulating, individual characteristics in an effort to compose the student body offering the highest quality educational opportunities to all students. For in this situation no one group, majority or minority, is being preferred to any other. The objective of improving the education of all is

non-discriminatory in every sense of the word. Each special characteristic carries value as a contributor to the diversity of the whole.[5]

Counsel for the Anti-Defamation League of B'nai B'rith argue (Brief as *Amicus Curiae* at 24) that counting minority status as a factor favoring admission is "invidious" and "stigmatizing" to the students admitted because they suffer from the "uncommunicated realization that perhaps we were not authentic law students and the uneasy suspicion that our classmates [and certain members of the faculty] knew that we were not . . . ." This problem of the black student and students from other disadvantaged minorities is very real (see Cox Commission Report, Crisis at Columbia, 15-16 (New York, 1968)), but it arises from past racial injustices which have built a variety of inequalities into the whole structure of our society. To say that the individual black students, who are admitted to law school because of the weight given to their special background, outlook and talents and who may carry with them handicaps to high intellectual performance imposed from the past, are the victims of current stigmatizing and invidious treatment by the law school admitting them, flies in the fact of reality. First, the admitting law school does not create the feared intellectual handicaps. Second, the true comparison is not between attending law school with possible intellectual handicaps and without, but between attending with the possible handicaps and not attending at all. Third, all the law school does is to open an educational opportunity to the minority student which would otherwise be closed; the choice is the student's. Fourth, exclusive reliance upon

[5] The risk that "diversity" will be used as a cloak for reducing the numbers of any identifiable minority is small. Should statistical evidence show a pattern of decrease, the burden might fall upon the institution to rebut an inference of "hostile" and therefore unconstitutional discrimination.

tests of "intellectual competency and capacity" would long postpone eliminating the disadvantages in access to higher educational and career opportunities imposed upon minority groups by long years of society's hostile discrimination. Counsel offer in response only their pleasant but unproved (and we think utterly false) supposition that more vigorous recruitment would produce many applicants of higher intellectual attainment. (See Brief of American Jewish Congress as *Amicus Curiae* at 6.)

On the side of petitioners, it is also argued that giving favorable weight to minority status means that in the competition for the final place in an entering class members of the white race are put at a disadvantage because they may be passed over in favor of a black applicant whose other claims to selection are no greater than theirs; and imposing such a disadvantage in the comparison of A with B is said to be "invidious." The answer, we submit, is twofold: First, the comparison should not be perceived, and in truth is not made, in terms of race or color as such, but in terms of contribution to the richness and diversity of the contributions A and B respectively can make to the education of all students. Second, the risk that A will nonetheless perceive the distinction as mark of official bias towards the black race is too small to warrant subordinating the values promoted by allowing educational authorities thus to pursue non-discriminatory educational objectives.

In this connection, it is relevant to note that our submission does not require a ruling upon the constitutionality of fixed numerical target-quotas. In seeking rich and stimulating diversity in a class of limited size some attention to numbers is necessary, as pointed out above (pp. 16-17, *supra*). Students too few in number to be adequately representative of their background will not produce effective diversity whether they be from mid-western farmlands

or urban areas. Too small numbers may also create a harmful sense of isolation. Such attention to numbers carries very different connotations from fixed minority target-quotas. The latter assert absolute concern for race, color or ethnic origin as such, without regard to other forms of diversity. Under a target-quota system, a black applicant, a chicano and a native American Indian, for example, will each be admitted to fill the appropriate minority quota without looking to see what background, experiences, outlook and interests he is likely to bring to the class, and without comparing his probable total contribution with the probable total contribution of non-minority applicants competing for a place.

The foregoing considerations, separately and in combination, amply demonstrate that attention to minority status in selecting a class from among many qualified applicants for a limited number of places involves no "hostile" nor "invidious" discrimination. For this reason attention to minority status as one among many sources or indicia of diversity need not be justified by proof that it is necessary to serve a "compelling public interest." The "compelling interest" test applies only to hostile or invidious discrimination, or to discrimination in relation to fundamental rights. The latter branch of the rule is irrelevant because no one suggests that selection in the competition for a limited number of places in a law school is a "fundamental right." Cf. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 29-39 (1973). The occasional expressions concerning application of the compelling interest test to classifications, such as race, color or alienage, which are "inherently suspect" or "immediately suspect" should not be lifted out of context. *E.g., Frontiero* v. *Richardson,* 411 U.S. 677, 682 (1973); *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944)). All involved hostile or invidious discrimination. In *Frontiero* v. *Richardson,* for example, the opinion

announcing the judgment of the Court makes plain that its conclusions stem from a history of discrimination *against* women based on assumptions of female inferiority. 411 U.S. at 684-687. *Loving* v. *Virginia*, 388 U.S. 1 (1967) struck down "measures designed to maintain White Supremacy" (388 U.S. at 11). In *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) the State law involved " 'as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment' " (379 U.S. at 194, quoting *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). *Bolling* v. *Sharpe*, 347 U.S. 497 (1954) condemned for the District of Columbia what *Brown* v. *Board of Education*, 347 U.S. 483 (1954) called "state-imposed discriminations against the Negro race" (347 U.S. at 490). The *Bolling* opinion itself spoke of " 'discrimination . . . *against* any citizen because of his race' " (347 U.S. at 499, quoting *Gibson* v. *Mississippi*, 162 U.S. 565, 591 (1896)) (emphasis supplied). *Graham* v. *Richardson*, 403 U.S. 365 (1971) found that "[a]liens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom . . . heightened judicial solicitude is appropriate" (403 U.S. at 372). *Oyama* v. *California*, 332 U.S. 633 (1948), involved a statute which "singles out aliens of Japanese ancestry" for hostile treatment (concurring opinion of Black, J., 332 U.S. at 647). *Korematsu* v. *United States*, 323 U.S. 214 (1944), held that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" (323 U.S. at 216). *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), also dealt with legislation directed against a minority group. Thus, the "inherently suspect" classifications have uniformly involved that invidious discrimination which "is a hostile and oppressive discrimination against particular persons and classes" (*Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940)).

The goal of improving the education of all students is plainly a permissible objective and attention to race is a well thought-out, even if debatable, method of improvement. Since the attention paid to race in seeking students of diverse backgrounds is not "invidious," the choice of the goal and method of achieving it are within the constitutional range of educational discretion. See pp. 27-30, *supra*.

The result should be the same even if every non-invidious official cognizance of race requires compelling justification. Seriously seeking to improve the non-discriminatory opportunities of all students is a compelling purpose. To require proof that promoting diversity is essential to improving education or that adequate diversity cannot otherwise be obtained, would impermissibly substitute judicial control for the seriously-considered, impartial and reasoned judgment of the educational authorities in whom the responsibility is vested.

II

THE EQUAL PROTECTION CLAUSE DOES NOT DENY STATE EDUCATIONAL AUTHORITIES THE DISCRETION TO GIVE FAVORABLE WEIGHT TO RACE, AMONG OTHER CRITERIA, AS A MEANS OF SECURING FOR DISADVANTAGED MINORITIES A MORE EQUITABLE DISTRIBUTION OF EDUCATIONAL OPPORTUNITIES AND PROFESSIONAL SERVICES.

A. Giving Favorable Weight to Minority Status in Selecting Qualified Students for Admission Is an Important Method of Reducing the Disadvantages Suffered by Minorities in Educational Opportunity and Professional Services.

Definition of community needs and choice of emphasis in filling them is a central aspect of educational policy-making at any institution of higher learning, whether privately-endowed or a State institution. One medical school may

specialize in research and produce new generations of researchers and teachers in medicine; another school might seek principally to provide general practitioners for rural communities. A school of education may be content to graduate the most intelligent and cultivated teachers even though nearly all gravitate towards well-paying positions in wealthy surburban school districts; another may conceive the major part of its educational mission to be the provision of more effective teachers for rural schools, or for the primary grades, or for high schools, or for schools in urban ghettos. More often than not the choice of policy calls for special emphasis rather than total concentration. It is hard to imagine one law school devoting all its energies to training trial lawyers while another graduates specialists in the law of corporations and finance, but it is easy to visualize a faculty choosing to put special emphasis upon either. Furthermore, selective emphasis is often put upon particular objectives in undertaking specially oriented programs financed by State or federal government or a foundation.

An institution's criteria for selection of qualified students for an entering class or a particular program may be deeply influenced by its objectives. A medical school emphasizing the training of general practitioners may look for different qualities than one primarily concerned with higher levels of teaching and research. A school of education worried by the quality of teaching in the blighted areas of urban centers will hardly make its selections by the same criteria as one primarily concerned with educational administration.

In recent years many institutions of higher education have become gravely concerned about the disadvantages suffered by minority groups in access to higher education,

business and professional opportunities, and professional services. Many kinds of obstacles face members of minority groups who might otherwise enjoy higher education: sheer prejudice, cultural barriers, language barriers, inferior schooling, economic obstacles, alienation and isolation, lack of incentives, *et cetera*. Many of the obstacles are the direct or indirect consequences of slavery, "white supremacy" and other historic prejudices leading to the poverty and isolation of disadvantaged groups. The barriers to entry into professional schools are also obstacles to entry into the professions. The lack of representative numbers of minorities in the professions not only deters successive generations of young men and women in minority groups from seeking higher education; it also narrows the membership and therefore the vision of the professions, and the availability of professional services. The obstacles at one level sustain and intensify the difficulties at another. Few barriers have been absolute, but it is beyond dispute that American life has put blacks, chicanos, Puerto Ricans, American Indians and, at some times and some places, other minorities at a severe disadvantage in opportunities for higher education, professional and executive careers, and the enjoyment of professional services.

The posture of the legal profession illustrates these generalities. In 1940 there were only about 1,425 black lawyers in the United States. By 1960, the number had doubled but they were still only 1 percent of all lawyers.[4] By 1968 the percentage had not significantly changed. Whereas one American in 625 became a lawyer, only one black American in 7,100 entered the legal profession.[5]

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[4] Leonard, *The Development of the Black Bar*, 407 Annals (May 1973) 134, 140.

[5] E. Gellhorn, *The Law Schools and the Negro*, 1968 Duke L.J. 1069, 1073.

Similarly, in 1965 there were only 700 black law students, almost half of whom attended five predominantly black law schools. Black student enrollment was about 1.3 percent of total enrollment, and in the 145 non-black law schools, well below 1 percent.[6] There has been substantial increase within the last six years, but black, chicano and American Indian percentages of total enrollment are still less than half of their respective percentages of the United States population as a whole.[7] These differences cannot be explained as merely a statistical quirk. See *Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), aff'd *sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The barriers previously discussed have been formidable; though lessened perhaps today, they continue to be real.

The benefits of removing those obstacles and hence increasing opportunities for disadvantaged minorities in the law schools and later at the bar fall under four headings: (1) increasing the individual's opportunities for challenge, satisfaction and advancement, (2) broadening the membership and therefore the understanding of the legal profes-

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[6] 1965 *Proceedings of the Association of American Law Schools* 112.

[7] *United States Bureau of the Census, Persons of Spanish Origin in the United States: March 1972 and 1971*, 1; *United States Bureau of the Census, General Population, Statistical Summary Report*, 1970, Table 48.

Law school enrollment for several minority groups in the past few academic years, including the present, is as follows:

Year	*Total Law Students*	*Black Americans*	*Chicanos (Mexican-Americans)*	*American Indians*
1969-70	68,386	2,128	412	72
1970-71	82,479	Not available	Not available	Not available
1971-72	94,468	3,744	833	140
1972-73	101,707	4,423	1,072	173
1973-74	106,102	4,817	1,259	222

(Association of American Law Schools, *1973 Survey of Minority Groups in Legal Education.*)

sion, (3) improving the access of minorities to understanding practitioners, and (4) improving legal education.

The United States prides itself as a Nation in providing open opportunity for success and satisfaction to all of its citizens. Law can be a wonderfully exciting and rewarding profession. Its challenge to human understanding and intellectual discipline is enormous. Its perquisites are often large both in terms of material wealth and social esteem. There is no reason to believe that, all other things being equal, minority members of society would wish any less than others to strive for and attain the status of attorney-at-law. Indeed, there were ten applicants for every one opening in the Council on Legal Education Opportunity (CLEO) program in the summer of 1973.[9]

Surely, as membership in the legal profession becomes broader, so does its perspective. Collegial discussions and interactions with those who have first-hand knowledge of community and societal problems adds to the comprehension of the profession as a whole. Moreover, as membership becomes broader, understanding of the legal profession by larger segments of the population is also enhanced. What was heretofore only television knowledge is replaced by contact with friends and acquaintances who are lawyers in the same community. They may become role models for aspiring young men and women who had not previously appreciated their opportunities to practice law. Similarly, those once reluctant to seek legal advice may become less inhibited when they have access to attorneys with whom they are familiar, either personally or by reputation, within

[9] 18 American Bar News, No. 10, October 1973. For the past several years CLEO has sponsored summer programs at various law schools to help prepare minority college students for the study of law. The large number of applicants for the 214 places in the 1973 programs is but one illustration of the desire of many minority students to enter the legal profession.

their own community. This is not to say that only a black attorney can represent a black client or that a chicano must be represented by another Mexican-American. But it is myopic to believe that there is no difference in seeking representation from a person with whom one can identify as opposed to an "outsider."

We have discussed at length the ways in which diversity among undergraduates can add to the educational process. Law is an intellectual profession, but the law's concern is men and women, their daily lives, their joys and sorrows, their fears and aspirations, their mean pursuits and high adventures. Without sympathetic understanding of life, perhaps without understanding the persons with whom he deals better than they understand themselves, a lawyer is scarcely worthy of the name. Diversity of experience, background, outlook and interests among law students matriculating together contributes to that understanding for all students, and may be indispensable for many. Although the interchange of ideas among very bright students who are all from similar backgrounds is usually intelligent, it may be so one-dimensional as to be more filling than fruitful. One has only to contrast an imaginary discussion of the present case in a diversified class with the likely course of discussion in a homogeneous class of any single race and socio-economic status. Where the social ideas are as important as formal logic, diversity is a nutrient of intellectual growth.

The learning process also suffers if pluralism is limited to the students. See *Bradley* v. *School Board*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965), *Porcelli* v. *Titus*, 302 F. Supp. 726 (D.N.J. 1969), 431 F. 2d 1254 (3d. Cir. 1970), cert. den. 402 U.S. 944 (1971). As members of minority groups have gained the opportunity for gradu-

ate and professional education, increased numbers have remained in the academic sphere. For example, between 1947 and 1969, as the number of black doctorates increased from 381 to 2,280, the number of black faculty at white schools also multiplied approximately seven times.[9] The first full-time black law school faculty member to serve at a predominantly white law school was William R. Ming, who taught at the University of Chicago from 1946 to 1950. In 1963, only four blacks had held full-time faculty positions in white law schools. Today, approximately one hundred black faculty members teach at the 148 accredited law schools, with about fifty of them at predominantly white law schools.[10]

Law schools have attacked the obstacles to minorities' access to legal education in many different ways. Active programs of recruitment are one; special courses aimed at lessening educational or cultural disadvantages are another; better appreciation of the causes of modest scores on admissions tests is a third. As illustrated by the present case, many law schools have modified their admissions programs, either procedurally or substantively or in both respects, in order to facilitate the admission of more students from minority groups.[11]

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[9] Rafky, *The Black Academic in the Marketplace*, Change (Fall, 1971) 6, 66.

[10] Parker and Stutzman, *Legal Education for Blacks*, 407 Annals (May 1973) 144, 152.

[11] See Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 U. Tol. L. Rev. 321; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education*, 1970 U. Tol. L. Rev. 281.

Professor Summers in *Preferential Admissions: An Unreal Solution to a Real Problem*, 1970 U. Tol. L. Rev. 377, argues that such admissions policies do not significantly increase the total number of minority students able to obtain a legal education but instead merely shift the minority student up to better schools. Crucial to his thesis is the assertion that

Procedurally, law schools have processed minority applications in a variety of ways, just as there have been differences from school to school in the processing of non-minority applications. In some schools a minority admissions officer may review all minority applications before they are discussed by the full admissions committee. In others, like the University of Washington, separate subcommittees first consider the applications; frequently these subcommittees include a member of a minority group. Two common characteristics seem to be present in most procedures. First minority admissions officer is generally involved in reading all minority applications in order to bring to the admissions process a better understanding of the strengths and weaknesses of minority applicants. The presence of a minority admissions officer provides credibility for the process; this is extremely important when a previously all-white institution is trying to show that there are genuine opportunities for minority students. Minority admissions officers, therefore, are not a sign of preference. Second, final admissions decisions are generally made by the full committee, as in the case of the University of Washington. This step tends to make certain that all candidates who are accepted meet the academic standards of the institution and have other characteristics that demonstrate they deserve admission. Review by the full committee provides also an implicit comparison of minority and non-minority candidates even if a favorable recommendation has come from a separate subcommittee.

"[a]lthough entry into law schools at the upper end of the scale is extremely restrictive, admission into schools at the lower end of the scale is quite open." At 382. To whatever degree that might have been true in 1970, it is certainly not true in 1974. With over 100,000 applicants for 37,000 first year places, the days of open admission to law schools are gone. ABA, *Legal Education and Bar Admission Statistics, 1963-1973*. See also *Prelaw Handbook 1973-1974*, Association of American Law Schools and American Bar Association, *passim*.

Substantively, the criteria for admissions have been changed to take account of minority status, but the changes vary widely from institution to institution, and even within a single university such as Harvard. Changes may be limited to weighing standardized test scores differently for minority candidates than for the generality of applicants. An American Indian student who has lived all his life on a reservation and has not had the opportunity to attend the best schools may not score as well on the LSAT as his white contemporary even though he has the same promise of high academic performance. Formerly, he might have been rejected on academic grounds because there was no recognition of the reason for his poor test performance and no consideration of the contribution he could make by reason of his cultural background. Today these factors are taken into account. In the same manner, some professional and graduate schools may be willing to look less carefully at initial grades earned by minority students in predominantly white colleges on the assumption that adjusting to the new academic environment may, at first, be more difficult for them than for the majority of students. Other schools may feel that this adjustment factor pervades all four years of college education and that a minority student cannot be held to the same grade performance as a white student, not because he or she may be incapable of doing fine work but because minority status itself may bring pressures to bear that are not applicable to white students.

In addition, minority applications may be scrutinized much more carefully today by some schools to find nonnumerical qualities that predict academic and professional success. A moving and incisive personal statement, a lengthy letter of recommendation from a professor explaining the student's struggles with concepts that, although

familiar to most students, may be foreign to a Philippino-American or a barrio chicano, a letter from a family friend describing the applicant's childhood — all these non-mechanical credentials may outweigh or at least help to balance the numerical predictors. Thus, the University of Washington Law School sought to insure that initially all minority applications would be carefully reviewed by those whose own experience was relevant to the evaluation of the qualifications of these applicants. Accordingly, minority candidates whose mechanical credentials were lower than those of applicants from the majority culture, but whose entire record showed the Admissions Committee special promise, were admitted to the law school.

Some institutions feel that the best method of sharply increasing minority participation in the educational process is to set fixed and specific goals of minority representation, *i.e.*, target-quotas, which are designed to include rather than exclude. Although petitioners and *amici* make much of the assertion that any quota excludes if the total number of admitted persons is fixed, there is an important psychological difference between a target whose purpose is to bring minority representation up, with the consequence of bringing majority representation down, and a ceiling quota, large or small, which is intended to limit the number of applicants admitted from any identifiable group or groups. There is an even more important difference between fixing a specific target-quota for every minority group and giving weight to membership in a generally-disadvantaged minority. Some institutions follow one course and others the other. The record shows that the University of Washington is in the latter class. (St. 416, 420) Giving such favorable weight is often coupled, as it was at the University of Washington, with rough estimates of what would be "reasonable representation in the classes of persons from cer-

tain minority racial and ethnic groups . . . " but no specific number would be fixed and the estimate would yield if it could not be achieved without sacrifice of otherwise sound academic practice or clear injustice to competing applicants without the asset of minority status. (St. 416, 420)

All of these steps are indubitably means of implementing educators' decisions that among their objectives should be reducing and if possible eliminating the disadvantages suffered by minorities in access to legal education. They vary in pace and cadence. Some may indeed be wiser or more effective than others. But in whatever form, they are being taken now not by merely a few educators but by thousands of colleges and universities in the United States.[12]

B. The Equal Protection Clause Does Not Deny to Educational Authorities Discretion to Seek to Reduce the Disadvantages Suffered by Minority Groups in Access to Educational and Professional Opportunities and to Broaden the Legal Profession by Giving Favorable Weight to Minority Status in Making Selections Among Qualified Candidates for Admission.

Earlier in this brief we explained our reasons for concluding that the Equal Protection Clause does not deny educational authorities discretion to elect to give favorable weight to membership in a minority race, among other criteria, in selecting an entering class from a larger number of qualified candidates where they conclude that giving such weight will increase the diversity of the student body and thus improve the quality of the educational opportunities offered to all students. See pp. 19-33, *supra*. The legal analysis supporting that proposition is different in two

[12] See Educational Testing Service, *Graduate and Professional School Opportunities for Minority Students, 1973-74.*

respects from that required to support giving weight to race, or membership in another minority, as a way of reducing existing disadvantages in access to educational opportunities, career opportunities and sympathetic professional services. First, the objective of improving the quality of education for all students can fairly be called "non-discriminatory" in every sense of the word. Second, if there is anything "invidious" about looking to race or other minority status as a factor favoring inclusion in an entering class, the sting is minimal where such status is counted as an indication of some actual and more potential diversity in talents, background, outlook or interests (which are then examined further in each individual case) and weighted along with the many other personal attributes of all the qualified applicants. In contrast, the objective of reducing the existing disadvantages of minority groups is a racially-, religiously-, or ethnically-conscious objective, and minority status as such becomes a factor favoring admission.

Despite these distinctions, the result in the latter case should be the same as in the former. The Equal Protection Clause does not prohibit all racially-conscious government activity, but only that which is "hostile" or "invidious" towards minorities or else falls under the general constitutional ban upon arbitrary or capricious classifications. See pp. 31-32, *supra*. Giving an advantage in admissions to members of a minority long subject to invidious discrimination and stigma of inferiority imposed by the dominant groups is neither "hostile" nor "invidious." See pp. 27-30, *supra*.

Nor does giving such weight offend the general ban upon arbitrary and capricious classifications. Comparisons, selections and discrimination in the sense that some are

admitted and others excluded is inescapable unless the school is enlarged. Giving favorable weight to disadvantaged-minority status in making selections among qualified applicants for admission results in the exclusion of a number of white students who give less promise of superior law school grades than the white students actually admitted but give somewhat more promise than the minority students put ahead of them because of the asset of minority status. The decision to give such weight to minority status expresses a judgment that the public and private interests served by using only criteria measuring "intellectual competency and capacity" and admitting the former group are less important than the interests in removing the obstacles clogging the access of disadvantaged minorities to educational opportunities and professional careers, in bringing into education more of the rich diversity of life in the United States, and in broadening the membership and vision of the legal profession and its capacity to give all segments of society understanding legal services. The right of the State to pursue these objectives is independent of any inquiry into how far the existing disadvantages stem from past violations of the Equal Protection Clause rather than private discrimination. Plainly, the balance struck is neither arbitrary nor capricious; and the giving of weight to minority status in the process of admissions is reasonably adapted to the objectives.

Even if the "compelling interest" test be applied on the theory that any distinction along lines of race, color, language or ethnicity is "suspect," the decision below should be affirmed. Petitioners and the *amici* aligned with them cannot seriously question the disadvantages under which blacks, chicanos, and American Indians suffer in access to higher education and career opportunities and in the availability of understanding legal services. Nor do they deny

that the bench and bar would benefit from the addition of qualified members of these groups. These objectives plainly rise to whatever level of importance the term "compelling" imports. The opposing argument therefore reduces either to claims that the chosen method is not the best or to the contention that no distinction drawn along lines of race, color, language, or ethnic or national origin is ever constitutional.

We doubt whether the "compelling interest" test is intended to open the relative merit of different approaches to judicial determination, but even in the framework chosen by petitioners and supporting *amici*, the arguments are unpersuasive. They offer no convincing evidence that by more vigorous recruitment the numbers of minority law students and minority lawyers can be increased substantially within a reasonable time. The low numbers of the past and even the present are themselves deterrents to seeking higher education and a professional career. Nor is it persuasive to show that a good proportion of black law school graduates have entered law firms with predominantly corporate and financial clients. The phenomenon is probably a short-run consequence of the still-small numbers of black law students and the firms' efforts to open the same opportunities to young lawyers from minority groups as are available to others. Even if the number of black lawyers serving black clients did not increase, their presence at the bar, in the classroom and on the bench would help to demonstrate that the legal system is not managed exclusively by any portion of society. Their presence would also broaden the understanding of all lawyers and dissipate the fear that members of a profession substantially closed to minorities can rarely be expected to provide understanding and sympathetic representation.

Since petitioners cannot complain of the balance struck by the State in terms of either the "rational basis" or "compelling interest" test, their only alternative is to assert categorically that a State violates the Equal Protection Clause by drawing *any* distinctions along lines of race, language or ethnic or national origin, even in an area where rather fine distinctions based upon other personal characteristics are unavoidable (given limits on the available resources). Acceptance of this proposition would deprive government of power to address itself to the disadvantaged condition of such minorities except by euphemism or indirection.

The catastrophic consequences are evident without looking beyond the field of education. If minority status must be ignored in admissions, it must be ignored in awarding financial aid. Special programs concentrated upon overcoming obstacles to minorities' enjoyment of educational and career opportunities would be invalid. The Harvard School of Education has a special program, funded by three federal agencies, to train American Indians for positions of leadership in education. The U.S. Department of Health, Education and Welfare grants funds for a program at the Harvard Summer School to help prepare students for careers in medicine. The project grant states that the trainees are to be disadvantaged ethnic minorities.[13] The Council on Legal Education Opportunity, an organization primarily funded by the federal government, supports summer programs and provides scholarships for minority students at Harvard and other law schools. Only minority students are involved. Similar programs have been established at State Colleges and Universities all over the

[13] The program is now under review to determine whether as a matter of policy it should be opened to other disadvantaged groups.

country. It is hard to see how any of them can be constitutional if petitioners' core proposition is sustained. Indeed, one would suppose that even the special efforts at recruitment of applicants from disadvantaged minorities which some *amici* in support of petitioners advocate would be unconstitutional if anyone had standing to challenge them, for they too would be "suspect" because they operated along racial, ethnic or linguistic lines.

It does not suffice to answer that this case deals with law school admissions: Petitioners and the *amici* supporting them are not arguing merely that it is arbitrary and capricious, on balance, to subordinate the interest in the admission of more students to law school on the basis of superior "intellectual competency and capacity" to the interest in decreasing not only the obstacles which the past has imposed upon minorities in access to legal education and professional careers but also the inequities in the availability of legal services. Striking such a balance is surely not unreasonable. Nor can petitioners and *amici* fairly assert that the latter interests are not sufficiently "compelling" to warrant subordinating petitioner's interest in admission to law school although they might be "compelling" enough to permit distinctions along racial lines in other connections. Admission to law school on the basis of "intellectual competency and capacity" is not a fundamental right. *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 29-39 (1973). The very reason for confining the list of fundamental rights is to curtail judicial balancing of competing individual and social objectives where the function is properly one for responsible State officials. Petitioners' only conceivable basis for invoking the "compelling interest" test is the use of race or color as a basis of distinction. If the public interests served by reducing the disadvantages we have noted will not justify the racially-conscious dis-

tinction here, they will not justify any other racially-conscious distinction.

We are not unmindful of the fear that permitting consciousness of race to influence decisions to admit minorities now generally perceived as "disadvantaged" not only reduces the opportunities of all others but *could* become the occasion for throwing the whole burden of the reduction upon other minorities not now seen as disadvantaged. Nothing in the decision below or our argument suggests that any form of racial, ethnic or religious characteristic may be given the slightest weight in excluding any applicant who would otherwise be admitted. Such use perhaps could not always be proved, but that would be true regardless of the ruling in this case. The risk of the revival of such prejudice would not be enhanced by affirmance of the State court's decision.

Finally, we submit that three limitations upon the scope of any decision upholding the respondent's measures favoring the *inclusion* of members of minority groups are inherent in the situation.

First, the inequalities of opportunity which respondents are seeking to correct are plain beyond dispute. Consequently there is no need to consider whether abstractly similar measures would be unconstitutional in an era unmarked by the consequences of earlier, private and official, invidious discrimination.

Second, except for occasional references to special programs, our remarks are addressed to situations in which the favorable weight given to minority status does not bring the ratio of minority students in the whole class above the ratio of the minority group in the whole population from which all applicants are chosen. As we understand

the record, this is the case at the University of Washington Law School because it seeks students from all over the United States and the ratio of minority students admitted to all students admitted is not greater than the ratio of the same minorities to the whole population. Consequently, there is no need to consider when or whether special programs (such as those funded by CLEO) may be confined to minority students, or whether their status may ever be treated as an asset in filling a larger proportion of an entering class than the proportion of the minority to which they belong.

Third, we do not view the instant case as requiring a decision upon the constitutionality of fixed racial, ethnic, linguistic or national quotas. If any weight is to be given to minority status as a factor favoring admission, some sense of the amount of weight is probably required whether it be articulated or left to the individual judgment of each member of the admissions committee. The weight may be simply an "edge" in otherwise doubtful cases. At the other extreme, enough weight might be given to produce a specific, fixed number of students from specified minority groups. Middle courses treat as determinants a rough sense of:— (1) the number of capable students from any particular minority the institution had already admitted or might expect to admit in the particular year, (2) the degree of loss to the individual applicant and the institution attendant upon his degree of lower predicted grade average, (3) the extent to which other indicia of ability could appropriately be counted as counterpoints to somewhat lower but adequate predictions of law school grades, and (4) the strength of the qualifications of the applicants the particular minority applicant or applicants would displace. Petitioners have failed to prove that respondents' practice does not fall somewhere in this middle ground.

From a constitutional standpoint, the differences between giving favorable but undefined weight to minority status and fixing a specific numerical target for the admission of at-least-minimally-qualified minority applicants may not be significant. But the differences are so important in terms of educational philosophy and fairness among individuals as to lead us to suggest that the question should be reserved. Even in an age seeking only to reduce the disadvantages which minority groups generally suffer as the ingrained consequences of earlier hostile official and private discrimination, the allocation of a fixed target-quota of places proportionate to the ratio of the minority in the population seems to assert a group entitlement based solely upon numbers. Fixed target-quotas for each minority close places to individual members of different groups regardless of any number or degree of relevant qualifications. They impart a quite different philosophy than a teaching that in the competition for a limited number of places some adjustment must be made for social objectives but they are to be weighed in individual cases along with other claims to the places available. Whether the differences have constitutional significance it is unnecessary now to decide.

In *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42 (1973) the Court observed that "education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.' " Few are as insoluble as the problem of selecting those students for admission who will do most to enhance the quality of education available to them all. None is as intractable as the problems of relieving the deeply-ingrained obstacles that history has put in the way of minorities' enjoyment of access to higher education and the opportunities to which it leads. Quite possibly the long-

run costs to the educational system of even the seemingly-modest departures from the traditional tests of "intellectual competency and capacity" at issue in this case will prove much heavier than their advocates suppose. Quite possibly the traditional notions of "intellectual competency and capacity" will be found to ignore important dimensions of human experience and understanding, urgently requiring the attention of educational institutions. Quite possibly the debate is less important than it seems, and variety of approaches will be the ideal solution so long as the "inequalities" persist. We do not advocate any one view. No one view is uniformly pursued at Harvard University. The important point is that the debate and experimentation be allowed to proceed at all institutions of higher education, whether state or privately-endowed, rather than shut off by a novel constitutional limitation on the discretion of educational authorities.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

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FILED
FEB 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-235

MARCO DE FUNIS, *et al., Petitioners,*

v.

CHARLES ODEGAARD, *et al., Respondents.*

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AMICUS CURIAE IN SUPPORT OF THE DECISION BELOW

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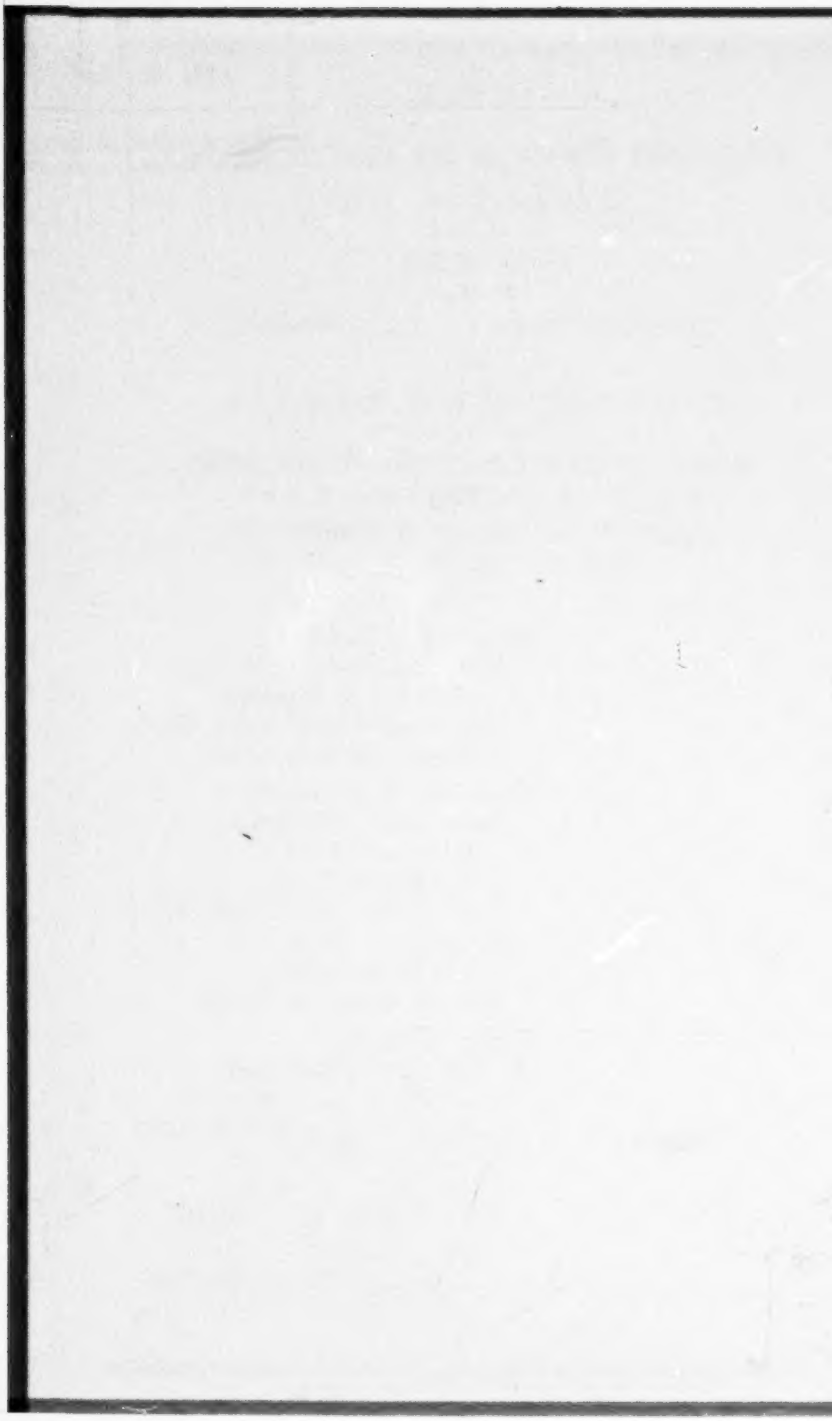

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AMICUS CURIAE IN SUPPORT OF THE DECISION BELOW

OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 82 Wn.2d 11, 570 P.2d 1169, and is reprinted as Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

Certiorari was granted November 19, 1973, and this case is before the Court under 28 U.S.C. § 1257(3).

CONSENT OF THE PARTIES

The Lawyers' Committee for Civil Rights Under Law files this brief with the consent of both parties whose letters of consent have been filed with the Clerk.

QUESTION PRESENTED

Whether applications for admission to a state law school filed by individuals of a recognized "minority" race can be reviewed by a special admissions process designed: (1) to identify qualified applicants whose qualifications could not be accurately assessed without such a special procedure; and (2) to ameliorate the continuing effects of past racial discrimination by obtaining a law school student body of qualified "minority" and "majority" students?

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers called at the White House by President John F. Kennedy. It is a nonprofit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and three former Attorneys General. The Committee filed a brief and argued in this Court as an *amicus* in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969).

The Committee, being composed of lawyers, is particularly concerned with civil rights issues involving legal education. The Committee's "Retained Lawyer Program," designed to assist black lawyers establish

legal practices in Mississippi, is based on the Committee's belief that adequate legal services for minorities can be assured in the long run only by increasing the number of minority lawyers in the legal profession. Because we believe the issue in this case is of critical importance to achieving such racial equality in legal education and of far-reaching significance to the entire civil rights effort, the Committee files this brief in support of the decision below.

INTRODUCTORY STATEMENT

Petitioner Marco DeFunis, Jr., twice applied for admission to the University of Washington Law School and was twice denied such admission. Following the second denial, and prior to the commencement of classes in September of 1971, DeFunis, his wife and his parents filed suit in the Superior Court of Washington seeking an order compelling his admission.[1] Petitioners' complaint claimed only that the law school unlawfully admitted students who were "not residents and taxpayers of the state of Washington" as well as "many candidates whose qualifications and credentials [were] much below the credentials and qualifications of" DeFunis (App. 14-15).[2] The complaint set forth in detail DeFunis' admirable undergraduate and graduate scholastic records, academic honors, and high ranking on the Law School Admission Test ("LSAT"). The complaint predicted that DeFunis would perform in law

[1] DeFunis had been admitted to four other law schools, but preferred to attend the University of Washington.

[2] "App." refers to the Single Appendix filed in this Court; "R." refers to the full record filed with the Clerk, "Pet. App." refers to the Appendix to the Petition for Certiorari.

school "as an honor student." (App. 15). Thus, this case was initiated on a theory that admissions to law school must be strictly and mechanically governed by ranking applicants on the basis of grade-point averages and LSAT scores. The complaint did not allege the existence of racial discrimination.

The racial issue now before this Court arose at the trial of this case when it developed that the law school had adopted a special admissions program to identify qualified applicants of recognized "minority" ethnic background. Applications of such minority individuals, *i.e.*, Black Americans, Chicano Americans, American Indians, and Philippine Americans, were given special consideration by admissions officers believed specially qualified to evaluate the potential success in law school of such applicants. All files of Black applicants—regardless of the applicant's "Predicted First Year Average" (PFYA)[3]—were reviewed initially by both a law professor who had served as director of the school's summer training program for disadvantaged prospective law students and a second-year Black law student who had served earlier "as director of the Governor's Multi-Service Center in Seattle, a job involving considerable personnel evaluation." (82 Wn. 2d—, 570 P.2d 1175; Pet. App. A-10). These two individuals were selected, according to the admissions chairman, because their experience made them "best . . . able to assist the committee in the interpretation of those files." (R. 00509). Applications of all Chicanos, American Indians, and Philippine Americans were reviewed by an associate dean of the law school. All minority

[3] This figure is a mathematic calculation based on pre-law school grades and LSAT scores.

applications were later considered by the full admissions committee, which was the only body that could extend an offer of admission. Minority applications were evaluated as a group and not compared directly with non-minority applications. (R. 00457-9)

Applications of non-minority individuals with a PFYA of 74.5 or greater were also in all cases considered by the full admissions committee. Applications of non-minority individuals with PFYA's below 74.5 were reviewed initially only by the chairman of the committee who would refer them to the full committee or reject them himself. As a general rule applications with a PFYA of 77 or above were considered by the full committee immediately upon receipt of all necessary papers, while those below 77—as well as several above 77—were deferred for later consideration at the same time as those between 74.5 and 77 and those below 74.5 which had been referred to the full committee by the chairman—a referral option which he exercised frequently. (R. 00448) Thus, regardless of PFYA, *no* applicant was automatically accepted (R. 00363) and seven to twelve with PFYA's above 77 were in fact rejected. (R. 00449; App. 34) [4]

The trial court concluded that the different procedures employed in evaluating minority applicants

[4] It is important to note that the minority admissions program did not operate so as to impose a substantial or unreasonable burden on the majority "white" class. The admissions process resulted in the acceptance of 37 "minority" students out of more than 275 total acceptances, while 18 of the approximately 145 students who actually enrolled were "minority" individuals (App. 37-46; Def. Ex. 44, p. 27). Thus, approximately 13.4% of the applicants accepted and 12% of students entering were "minority" individuals. If Asian students are considered as part of the "minority" class, the percentages increase to 15% of students admitted and 15% of actual enrollees who were "minority" individuals.

constituted a denial of equal protection of the laws in violation of the Fourteenth Amendment (App. 54). That Court further found "[t]hat some minority students were admitted . . . prior to and instead of [DeFunis] with college grades and aptitude test scores [PFYA's] so low that had they been white, their applications would have been summarily denied." (Finding XXIII, App. 53). This finding was made despite the fact that the record shows unequivocally that *no* applicant—regardless of race—was summarily rejected on the basis of low PFYA's. Every application, regardless of race and regardless of PFYA, was reviewed individually by at least one member of the admissions committee. Indeed, at least ten of the non-minority applicants with PFYA's below 74.5 were actually admitted to the law school following full-committee review. (App. 37-46). And approximately fifty applications of non-minority applicants with PFYA's below 74.5 were reviewed by the full committee following screening by the chairman. (R. 00028). The record is thus clear that there was no threshhold PFYA below which a non-minority applicant was summarily rejected. PFYA's were used to *screen* applications, but admission or rejection depended on whether or not the applicant was judged "capable of successfully completing the law school program" and able "to make significant contributions to law school classes and the community at large." (82 Wn.2d—, 570 P.2d 1176; Pet. App. A-10, 12). The admissions officials saw PFYA's as only one factor in a determination of "qualifications"; the trial court equated "qualifications" with PFYA's alone. (R. 00553-561).

Although different procedures were utilized to screen minority and non-minority applicants, the standard of

admissions applicable to all was the likelihood of success in law school. As the chairman of the admissions committee testified:

> "Our attempt, throughout, is to assess the relative probability of the individual's succeeding in law school, that criterion was applied to these [minority] applicants, as well as it had been to the other applicants. They were simply not directly compared. We sought, within the minority category, those persons who we thought had the highest probability of success in law school." R. 00459.

The trial court ordered the law school to admit DeFunis in September of 1971. Although the Washington Supreme Court later reversed that order in March of 1973, DeFunis has continued his legal education at Washington without interruption by virtue of a stay granted by Mr. Justice Douglas on June 5, 1973. Assuming continued satisfactory progress, DeFunis will graduate in June 1974.

Some of the briefs filed in this Court have sought to portray this case as one involving rejection of "qualified" non-minority applicants in favor of "unqualified"—or at least "far less qualified"—minority applicants. We submit that this record will not support such a thesis; it would be an error of extraordinary dimensions to decide the important constitutional issue in this case on the basis of that characterization of the record. The record here does show what the law school itself recognized when it instituted the special admissions program for minority applicants, namely, that law school admissions "qualifications" cannot be measured purely mechanistically, at least not in a profession as intensely human and personal as the law. Academic credentials

and high test scores do not necessarily make good law students, much less good law practitioners. Some of this country's most eminent lawyers and jurists came from educational and cultural backgrounds which might have produced "low" PFYA's under today's evaluative techniques. Yet no mechanical test known to man can accurately assess the qualities of judgment, character, stability and compassion needed in good lawyers and law students. Those traits demand personal evaluation. Where the applicant is an individual whose own background, education and experience may differ markedly from that of the conventional admissions officials and whose conventional test scores may not accurately predict performance, special procedures may well be necessary. The real issue in this case is whether a law school can permissibly recognize this fact and develop special admissions procedures to do something about it.

The dean of the law school testified without contradiction on the need for special evaluation of minority applications:

> "We are also aware that because of these factors [cultural disadvantage] some of our usual methods of evaluating [minority] applicants are not accurate.
>
> . . . .
>
> "Some of the indicators are not particularly good . . . they have a margin of error even as to students from the majority culture, and we know that as to students from these minority cultures, they may be even less reliable.
>
> . . . .
>
> "We set [minority applications] aside and we separately evaluate them because they present a separate kind of evaluation problem." (R. 00524-525; *see also* R. 00087-88, 00173, 00190-191, 00516).

One central fact emerges in this record. As the Washington Supreme Court itself recognized, *all* the admitted applicants—regardless of race, and regardless of admissions procedures—were judged "qualified" to complete the law school program by the admissions committee. (82 Wn.2d—, 570 P.2d 1176; Pet. App. A-12). The only way one can conclude that some minority students who were admitted were "less qualified" than other students is by forcing the question into an unrealistic and unwise framework of statistical objectivity—a reduction of the admissions process to a mechanical science of computers instead of an art of human dimensions. Neither our law schools nor our courts should fall prey to this deceptively logical measure of aptitude, especially at a time when the validity of standardized tests when used to evaluate minority individuals is widely questioned.[5]

ARGUMENT

I. TO THE EXTENT THAT RACE WAS A FACTOR IN THIS ADMISSIONS PROCESS, NO UNCONSTITUTIONAL DISCRIMINATION WAS IMPOSED.

The record here is clear that race *per se* was not the single determinative factor in admission to this law school. The process did not involve automatic admission or rejection of any applicant solely because of race. Cf. *Sweatt* v. *Painter,* 339 U.S. 629 (1950). The conclusion sustained by this record as to the role of race in this admissions process is that applicants of certain minority races went through an initial admissions screening process somewhat different than

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[5] See, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598 (1969).

that employed for non-minority applicants. Furthermore, even if the record is read to reach some conclusion regarding the relative "qualifications" of minority vs. non-minority applicants, the most that can be said is that some minority applicants with lower mechanical "predictions" of scholastic success were admitted while some non-minority applicants with higher prediction quotients were denied admission. The use of race here does not violate the Constitution. [6]

A. Consideration of Race for Purposes of Integration and Overcoming Historical Racial Deprivation Is Consistent With the Fourteenth Amendment and This Court's Decisions.

The history and purpose of the Fourteenth Amendment as well as this Court's decisions do not sustain the conclusion that official consideration of race is *per se* unconstitutional state action without regard to the circumstances. The first Mr. Justice Harlan's oft-quoted remark that "the Constitution is color-blind, and . . . does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights," *Plessy* v. *Ferguson,* 163 U.S. 537, 554, 559 (1896) (dissenting opinion), cannot be taken out of its historical context and distorted into a rigid, mechanical rule that uncritically equates consideration of race with unconstitutional action. The Framers of the Fourteenth Amendment did not intend such a simplistic rule. Indeed if race could *never* be

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[6] For a scholarly and thorough examination of the legal, sociological, educational and practical aspects of the issues involved in this case, see O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699 (1971).

considered by governmental authority, effective implementation of the Fourteenth Amendment would be impossible.

1. The Fourteenth Amendment

The social, political and legal history of the Fourteenth Amendment is well known. Since the first colonists settled this country in the early 1600's until after the Civil War, slavery and subrogation of minorities were widespread in America. Indeed the first Americans, the Indians, were subjected to conquest, ridicule and forced isolation well into the 1890's and even today remain isolated and segregated in many ways. That unconscionable aspect of the history of the formation of this Republic, born with racial discrimination and slavery in its midst, led to civil war. That war in turn led to historic declarations of equality and the legal termination of slavery by the ratification of the Thirteenth Amendment. But neither the war nor the related constitutional amendments or enabling legislation led to immediate equality. Even today the promises of racial equality set forth by Congress more than 100 years ago have not been realized. It is unacceptable, but nonetheless true, that substantial barriers to equality remain. As recently as 1968, a presidential commission was able to state—and document—the conclusion: "Our nation is moving toward two societies, one black, one white—separate and unequal." *Report of the National Advisory Commission on Civil Disorders,* at 1. History well proves the difficulties of obtaining—through law—the ultimate goal of equality: a society in which every individual is in truth treated equally as an individual, regardless of race, creed, color, sex or national origin. The Lawyers' Committee for Civil Rights Under Law is funda-

mentally committed to the attainment of that goal at the earliest moment. We are not yet there. Until we are, programs such as that involved here are not only proper, but are necessary. Until we can honestly say that we have a society in which race is irrelevant, the Fourteenth Amendment cannot be so "color-blind" as to prohibit achievement of racial equality. "Equal protection, not color blindness, is the constitutional mandate, and the experience of liberty of contract should caution against an absolute legal criterion that ignores practical realities." Freund, *Constitutional Dilemmas,* 45 B.U.L. REV. 13, 20.

The Framers of the Fourteenth Amendment and the Reconstruction Congress were not so naive as to believe that equality was attainable solely through enactment of legal provisions declaring all are equal. They knew that eliminating racial discrimination required a process which at times would necessitate affirmative consideration of race to attain the equality so long denied. Indeed many of the same individuals who wrote the Fourteenth Amendment participated in the passage of legislation creating the Freedman's Bureau in 1865, Act of Mar. 3, 1865, 13 Stat. 507. Although "[t]he Bureau's work was not confined to Negroes," S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 711 (1965), its primary purpose and design was to aid emancipated slaves facing the "burdens" of freedom. Passage by Congress of one of the so-called "Indian Preference Acts," § 6 of the Act of May 17, 1882, 22 Stat. 88, 25 U.S.C. § 46, also suggests that the contemporary view of the Congress was not to eliminate every consideration of race in government action regardless of consequence or intent. That statute, which mandates that preference be given to

Indians in hiring clerical, mechanical and other help on reservations and by Indian agencies, would have been impossible under the "color-blind" theory advanced by some briefs in this case.[7]

The Fourteenth Amendment was intended "to eliminate the degrading concomitants as well as the bare fact of chattel slavery." Hyman, *Segregation and the Fourteenth Amendment,* 4 VAND. L. REV. 55 (1951). Elimination of the badges of slavery required consideration of race then and in some cases it requires consideration of race now. Hopefully, some day, such consideration will be unnecessary.

2. This Court's Decisions

This Court has recognized that the Fourteenth Amendment envisions a process for attaining equality, not a static standard forever precluding any consideration of race. As this Court stated in *Palmer* v. *Thompson,* 403 U.S. 217, 220 (1971), "History shows that the *achievement of equality* for Negroes was the urgent purpose . . . for passage of the Fourteenth Amendment. . . ." (emphasis added). Until that equality is achieved, the purpose will not be fulfilled.

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[7] We recognize that technically the Freedman's Bureau and Indian preference laws represented *federal* legislation while the Fourteenth Amendment is restricted to *state* action. But certainly the post-Civil War Congress would not have passed those race-conscious acts if they truly believed the Fourteenth Amendment prohibited *any consideration* of race by the States. Those Congressmen, like this Court in 1896, undoubtedly recognized "that the Constitution of the United States in its [then] present form, forbids, so far as civil and political rights are concerned, discrimination by *the general government or by the states,* against any citizen because of his race." *Gibson* v. *Mississippi,* 162 U.S. 565, 591 (1896) (emphasis added).

In its first opinion interpreting the Fourteenth Amendment, this Court recognized the central purpose of that provision: "The existence of laws in the states where the newly emancipated Negroes resided, *which discriminated with gross injustice and hardship against them as a class* was the evil to be remedied by this clause. . . ." *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (emphasis added). Yet the Court has carefully eschewed any formulation of the Fourteenth Amendment that would prohibit the official consideration of race involved in this case. Indeed, commentators have stated that racial classifications *favoring* minority groups, rather than discriminating against them, are not unconstitutional. Professor Freund, for example, has suggested that no constitutional issue is raised by admissions programs designed to benefit the "disadvantaged segment of the community, whether economically, educationally, or politically." P. FREUND, ON LAW AND JUSTICE 44 (1968). Another writer has argued on a broader plane:

> "[T]he function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational and because in our society it would not stigmatize whites." Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L.Q. 1, 18 (1968).

This Court has itself held that race can be considered in educational planning, at least where desegregation of facilities is involved. In *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1 (1970), the Court approved a pupil transportation plan that relied extensively on race—and race alone—in determining school assignments. The Court recognized the practical realities of educational equality and the permissibility of racial assignments among schools, even when judicially-ordered desegregation was not involved:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. 16.

This case cannot therefore be decided simply by isolating the fact that applicants of minority races were treated differently. Racial classification is not *per se* unconstitutional without regard to the circumstances.[8]

The decisions of this Court striking down consideration of race by governmental authorities have involved certain characteristics not found in this case. The clearest unconstitutional use of race occurs when the

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[8] As one federal appellate court has put it, "Consideration of race is necessary to carry out the mandate in *Brown* . . . . Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." *Offerman* v. *Nitkowski*, 378 F.2d 22, 24-25 (2d Cir. 1967).

government singles out one race and imposes sanctions or deprivations of liberty. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); but cf. *Korematsu* v. *United States*, 323 U.S. 214 (1944). Other cases involve state-compelled segregation of races, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Next are cases in which the state encourages or facilitates private racial segregation, perhaps on pain of criminal sanction, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Finally there are the laws which encourage private racial discrimination or impose stigmas on individuals, *e.g.*, *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (statute requiring racial identification on ballots held unconstitutional because the state might thereby "encourage its voters to discriminate upon the grounds of race"); *Hunter* v. *Erickson*, 393 U.S. 385 (1969) (requiring a referendum on a fair housing ordinance held to place special burdens on minorities and facilitate discrimination); *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) (unconstitutional to "brand upon [blacks] an assertion of their inferiority" by excluding them from juries).

Each of these cases involve one of two elements: either maintenance of racial segregation or imposition of a recognizable psychological stigma or badge of inferiority. Neither of those factors is present here. Washington's law school admissions program was intended to—and will—promote an integrated society. It cannot be seriously contended that the "excluded" non-minority applicants were stigmatized or branded as inferior because of their race.

B. This Racial Classification Is Not "Invidious" and Is Supported by a "Compelling State Interest."

The court below held that the admissions procedure was not an unconstitutional racial classification. Racial classifications are normally "suspect" and consideration of their constitutionality involves two subquestions: (1) is the racial classification "invidious;" and (2) is the classification rationally related to a "compelling" state interest. *Cf., O'Neill, op. cit. supra,* at 711-18.

1. This Classification Is Not Invidious.

In a recent application of the "race-as-a-suspect-category" analysis, this Court again noted, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of *invidious* racial discrimination," *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967) (emphasis added). Throughout a long line of cases that critical adjective has been repeated. The dictionary defines the term as meaning "detrimental to reputation . . . full of envious resentment," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1966). This Court itself expressed the same meaning in *Brown* v. *Board of Education, supra,* when it noted the inevitable stigma imposed on the minority by racial segregation:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

So viewed, the effect of the classification involved here is not invidious:

> "A preferential admissions system for minority group students is clearly not a form of "invid-

ious" discrimination as that test has been defined by the courts. The goal of preferential admissions is not to separate the races, but to bring them together. Moreover, no conduct is made criminal, so that the precedents which have struck down state statutes where race has been an element of criminality are irrelevant. But even more important than the obvious differences between the goal of a preferential admissions system and the goals the Court has in the past found to be impermissible or invidious are the differences in the effect of such a system. Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites." O'Neil, *Preferential Admissions, supra,* at 713.

2. Attaining Racial Equality in Education Is a "Compelling" State Interest.

The central importance of racial equality in education is obvious and has repeatedly been recognized by this and other courts. Indeed the importance of equal education has been a sufficient factor to justify judicially-decreed affirmative consideration of race. *E.g., Swann, supra; Wanner* v. *School Board of Arlington County,* 357 F.2d 452, 454 (4th Cir. 1966); *Offerman* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967). The goal of equality is especially important in legal education. Racial integration of law school student bodies furthers important societal interests as this Court has itself noted:

"Although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isola-

> tion from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vaccum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt* v. *Painter, supra,* at 634.

The Washington Supreme Court here correctly analyzed the "compelling state interest" issue:

> "The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the state in producing a racially balanced student body at the law school is compelling.
>
> Finally, the shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within our legal system." 82 Wn. 2d at—, 570 P.2d at 1183-84, Pet. App. A-26.

Within the past few months a presidential commission has concluded that in spite of recent efforts to overcome racial discrimination in higher education, an equal opportunity to attend college is still not available to racial and ethnic minorities. NATIONAL COMMISSION ON THE FINANCING OF POSTSECONDARY EDUCATION, FINANCING POSTSECONDARY EDUCATION IN THE UNITED STATES (1973). That finding highlights the continued need for special admissions procedures such as the one involved here.

The special admissions procedure employed for minority applicants is a rational means of achieving the desired goal of educational equality. The University of Washington Law School officials reasonably concluded that traditional admissions procedures did not adequately evaluate minority applicants; they designed a system which could reasonably be expected to attain more accurate evaluations. That system employed individual review of minority applicants by persons familiar with the problems of those applicants and able to gain insight into true ability. It is not irrational to conclude that special cases need special consideration. See *Reed* v. *Reed*, 404 U.S. 1, 75 (1971); *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Nor is it irrational to conclude that today's educational tests and majority-oriented college programs do not predict law school performance as accurately for the minority applicant as they do for the non-minority applicant.

II. THE ARGUMENTS ADVANCED AGAINST THE DECISION BELOW ARE NOT PERSUASIVE.

Petitioners and the amici supporting their position advance varied attacks on the decision below. None are persuasive.

A. Petitioners Have Failed To Prove That the PFYA Standard Should Be the Only Measure of Law School Admissions.

The central thesis of petitioners' argument—as well as the basic assumption of the trial court's findings—proceeds from an analysis of law school admissions based solely on grades and tests. One commentator foresaw the thrust of this argument against minority admissions programs at law schools. It is based, he wrote, on a "leap from the undeniably correct premise

that students incapable of doing law school work should not be admitted to law school, to the wholly erroneous conclusion that law schools can and should determine student capability on the basis of undergraduate grades and LSAT scores. It assumes that through utilization of such criteria, admissions officers will unerringly select the best and most qualified applicants. This has never been the case." Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia,* 119 U. PA. L. REV. 364, 366 (1970).

This "test-and-grade" approach is not only factually erroneous, but has been rejected as a matter of law by this Court in an analogous context. In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the Court held, without dissent, that employment testing or measuring procedures could not be given controlling force in hiring if the effect was to exclude minority applicants unless those tests "are demonstrably a reasonable measure of job performance." *Id.* at 436. Recognizing that inferior education in the formative years leads to lower performance on intelligence and ability tests in later years, *id.* at 430, the Court placed on the proponent of ability testing the burden of showing that the tests used were accurate in their predictions and therefore not racially discriminatory.

Although *Griggs* involved a statutory question concerning § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the analysis used there is equally applicable here. Where utilization of ability tests has the effect of excluding minority applicants, those tests become themselves "suspect" and the proponent of relying solely on testing bears the burden. Since it is the petitioners who seek here to base admissions solely on tests and grades, it is *their classification* that is "suspect," not that of the law school.

The record in this case justifies the respondents' conclusion that utilization of grade and LSAT scores alone results in exclusion of minority students. According to a study of the American Bar Association's Section of Individual Rights and Responsibilities (Def. Ex. 7), approximately 2.7% of the students enrolled in law schools throughout the Nation in 1969-70 were black. Even that statistic can be misleading unless one notes that in the same year an estimated fifty law schools of the roughly 140 schools approved by the ABA enrolled 90% of all minority students. ASSOCIATION OF AMERICAN LAW SCHOOLS, THE LAW SCHOOLS AND MINORITY GROUP STUDENTS, 12 (1970). Low percentages of minority students go hand in hand with high reliance on LSAT scores and grade averages. Schools which have obtained higher numbers of minority students have done so by giving less emphasis to such test scores. *See, e.g.,* Fleming & Pollack, *The Black Quota of Yale Law School—An Exchange of Letters,* 19 THE PUBLIC INTEREST, 44, 50-51 (1970). The debate over "cultural bias" in the LSAT is widespread and has resulted in numerous discussions as well as studies by LSAT officials themselves. LSAT ANNUAL COUNCIL REPORT 201-02 (1970). In this context petitioners' advocacy of "quality" admissions standards must be viewed with the same legal skepticism invoked in *Griggs.* The Burden is on the petitioners; the burden has not been met.

Petitioners' advocacy of "quality" legal education without any special consideration for racial minorities is at this point in history similar to the position rejected last month by the Court in *Lau* v. *Nichols,* 42 U.S.L.W. 4165 (Jan. 21, 1974) (No. 72-6250). There a unan-

imous Court held that the failure of the San Francisco school system to provide English language instruction to children of Chinese ancestry denied them equal educational opportunity in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). The core of that opinion is a recognition that equal educational opportunity does not come simply as a result of objectively equal standards or curricula for all, regardless of individual circumstances. Although the obvious denial of equality in failing to provide means of eliminating language barriers may at first glance seem distinguishable from the failure to tailor admissions procedures to the special circumstances of minority students, the difference is only one of subjective sensitivity to the actual existence of discrimination. The University of Washington Law School reasonably concluded that special procedures for minorities were needed. It should not be stopped from doing what San Francisco failed to do by not treating different students differently.

B. Proven Existence of Prior Racial Discrimination Is Not an Essential Prerequisite to Affirmative Consideration of Race.

Some of the briefs filed in this case urge that race can only be considered where a prior history of race discrimination is proven. That position is not only contrary to common sense—for it precludes voluntary correction of deficiencies—it is inconsistent with the precedents. A finding of prior racial discrimination is necessary for a court to *order* affirmative racial action, but that is not the issue here. It is not contended that the University of Washington Law School was *required* to consider race as one factor in the admissions process, rather the issue is whether the Constitution *permits* the school so to decide. This

Court has noted the difference in *Swann* where it held that racial balance could voluntarily be adopted as a goal by local education authorities, but could not be ordered by a federal court "absent a finding of constitutional violation." *Swann, supra,* 402 U.S. at 16.

Cases in the federal appellate courts make clear that prior racial discrimination is not a necessary foundation for voluntary state action seeking racial equality. *Porcelli* v. *Titus,* 431 F.2d 1254 (3rd Cir. 1970), *cert. denied,* 402 U.S. 944, (1971), is instructive. There the Newark school authorities voluntarily adopted a policy for promotion and selection of principals and vice-principals which deliberately took into consideration the race of the teacher. The court of appeals rejected a constitutional challenge to that plan without requiring a finding of prior racial discrimination in faculty hiring or promotions. Indeed the district court had explicitly declined the invitation of the intervenors to find that prior "promotional examinations were conducted in such a way as to discriminate against Negroes." *Porcelli* v. *Titus,* 302 F. Supp. 726, 736 (D.N.J. 1969).

The Second Circuit Court of Appeals has also noted that a finding of prior racial discrimination is not essential to voluntary state efforts to achieve equality. In *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (1968), that court reviewed a complaint challenging urban renewal practices and held that the alleged failure to consider relocation of minority residents required a full evidentiary hearing. There the court said:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been

drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." 395 F.2d at 931-32 (footnotes omitted).

The relevant precedents recognize that voluntary affirmative action to obtain racial equality is permissible even if there has been no finding of prior racial discrimination.[9]

C. It Is Not Necessary To Draw the Classification on the Basis of Cultural, Educational or Economic Deprivation.

It has been suggested that the admissions program in question might be valid if cultural, economic or educational deprivation rather than race was used as the identifying factor for special consideration. The suggestion is not persuasive.

The problem addressed by the respondents was one of racial imbalance. That problem could be met only through considerations of race. But race was only a starting point and not the dispositive factor resulting in automatic admission. Race may have identified those applicants justifying special evaluation, but ability to perform in law school and contribution to the school and the community were the determining considerations.

The practical impossibility of using educational, cultural or economic deprivation as the factor indi-

[9] It cannot be assumed that no prior racial discrimination existed at the University of Washington Law School. The record here is inadequate to support that or a contrary conclusion. We are informed by an associate dean of the University of Washington Law School that of the 3,812 students graduated between 1901 and 1970, 12 were black. That statistic could itself "prove" discrimination in other contexts. Cf. *Turner* v. *Fouche*, 396 U.S. 346 (1970).

cating special evaluation was recognized by the trial court itself:

> "The way I looked at the evidence in this case was that to take a thousand Afro-American students and determine all that has happened to each one and then make a separate finding as to each one as to whether he was deprived in his childhood would be a very burdensome task; so that as I see it, the admissions committee just took, for example, the Black students and said these will be considered separately by the law school and by the professor interested in that program, and it was assumed that every Black student was a deprived person." (R. 00555).

Moreover, even if the administrative burdens could be overcome, the limited facilities and resources available for legal education prevent meaningful attempts to meet the problems of all cultural, economic or educational deprivation. *See,* O'Neil, *supra,* at 746-47. The law school chose to attack one area of recognized educational inequality. It should not be constitutionally restrained because it did not pick some other area or quixotically try to eliminate all educational inequality.

III. REVERSAL OF THE DECISION BELOW WOULD IMPERIL THE VIABILITY OF AFFIRMATIVE ACTION PROGRAMS.

It has been suggested that the decision below can be reversed without impairing other "affirmative action" programs. We disagree. In our judgment a reversal by this Court would jeopardize the vitality of school integration plans, Title VII employment programs, and other forms of affirmative action. Equally important, reversal here could lead to increased judicial dependence on the deceptively difficult distinction of *de jure-de facto discrimination.*

Elimination of racial discrimination nationwide—root and branch—is a hard task. In retrospect the early cases now seem simple and obvious. But elimination of facially discriminatory laws, as this Court well knows, did not produce overnight equality. Indeed more than fifteen years after *Brown,* desegregation of public schools still had not been achieved. Despite this Court's imperative in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), the job remains far from finished. This Court has witnessed the evasive devices of "freedom of choice." *Green* v. *County School Board,* 391 U.S. 430 (1968), "local control," *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972), and "boundary adjustment by states", *United States* v. *Scotland Neck City Bd. of Ed.,* 407 U.S. 484 (1972). The invocation of "qualifications" and "objective testing" has also been considered. *Griggs, supra.* The ultimate lesson of history is clear: elimination of racial discrimination and achievement of true equality is a hard job. The modes of masking discrimination are subtle and elusive. Implementing a "plan that promises realistically to work, and promises realistically to work *now," Green, supra,* at 439, frequently requires consideration of race—not just in school desegregation cases, but in other areas as well.

The experience of federal officials in attempting to eliminate job discrimination is typical. Congress tried to deal with the problem in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Practical implementation proved what we already know—a simple proscription on racial discrimination was not enough. Executive Orders were issued requiring "affirmative action." *E.g.,* Ex. Ord. 11246, 30 Fed. Reg.

12319, as amended (1965). This concept subsequently took the form of commitments to obtain percentages of minority employees within a predetermined range. Those goals necessarily involved affirmative consideration of the race of the applicant. *See, e.g., Contractors Associatiton of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

Realistic, workable affirmative action programs must be able to take race into account. At some point or other, existing programs do use race. Forcing all state-supported affirmative action programs to be rigidly "color-blind" can only have one of three undesirable results: (1) the programs cannot function; (2) the programs will be limited to the South and other areas where past discrimination can be judicially "proven;" or (3) courts and other government officials will resort to self-deceptive labels or procedures to insulate their actions from judicial invalidation. None of these results, we submit, is acceptable.

CONCLUSION

A generation ago, in *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337, 351 (1938)—a decision viewed by many as a turning point in civil rights adjudications—this Court indicated segregated legal education had no place in American society. Twelve years later that indication became clear law and the Court held in *Sweatt* v. *Painter* that "white only" law schools were unconstitutional. Now, twenty-four years after *Sweatt,* legal education remains to a high degree open only to the privileged majority. History, experience and this record show that without special admissions programs such as that under review we will not likely achieve equal legal educational opportunities for racial

minorities. The promise of *Sweatt* is just now being fulfilled by Washington and the other law schools that have chosen to recognize past inequality and do something affirmatively about it. That promise should not be broken. The decision below should be affirmed.

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FILED
FEB 7 1974
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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-235

MARCO DEFUNIS, et al., *Petitioners*,

vs.

CHARLES ODEGAARD, et al., *Respondents*.

BRIEF OF AMICI CURIAE

the Mexican American Legal Defense and Educational Fund; the Puerto Rican Legal Defense and Education Fund; the American Civil Liberties Union; the American G.I. Forum; Aspira of America, Inc.; IMAGE; the League of United Latin American Citizens; the Puerto Rican Bar Association, Inc.; the Puerto Rican Law Students Association, Inc.; the Raza Association of Spanish-Surnamed Americans; the La Raza National Lawyers' Association; the La Raza National Law Students Association.

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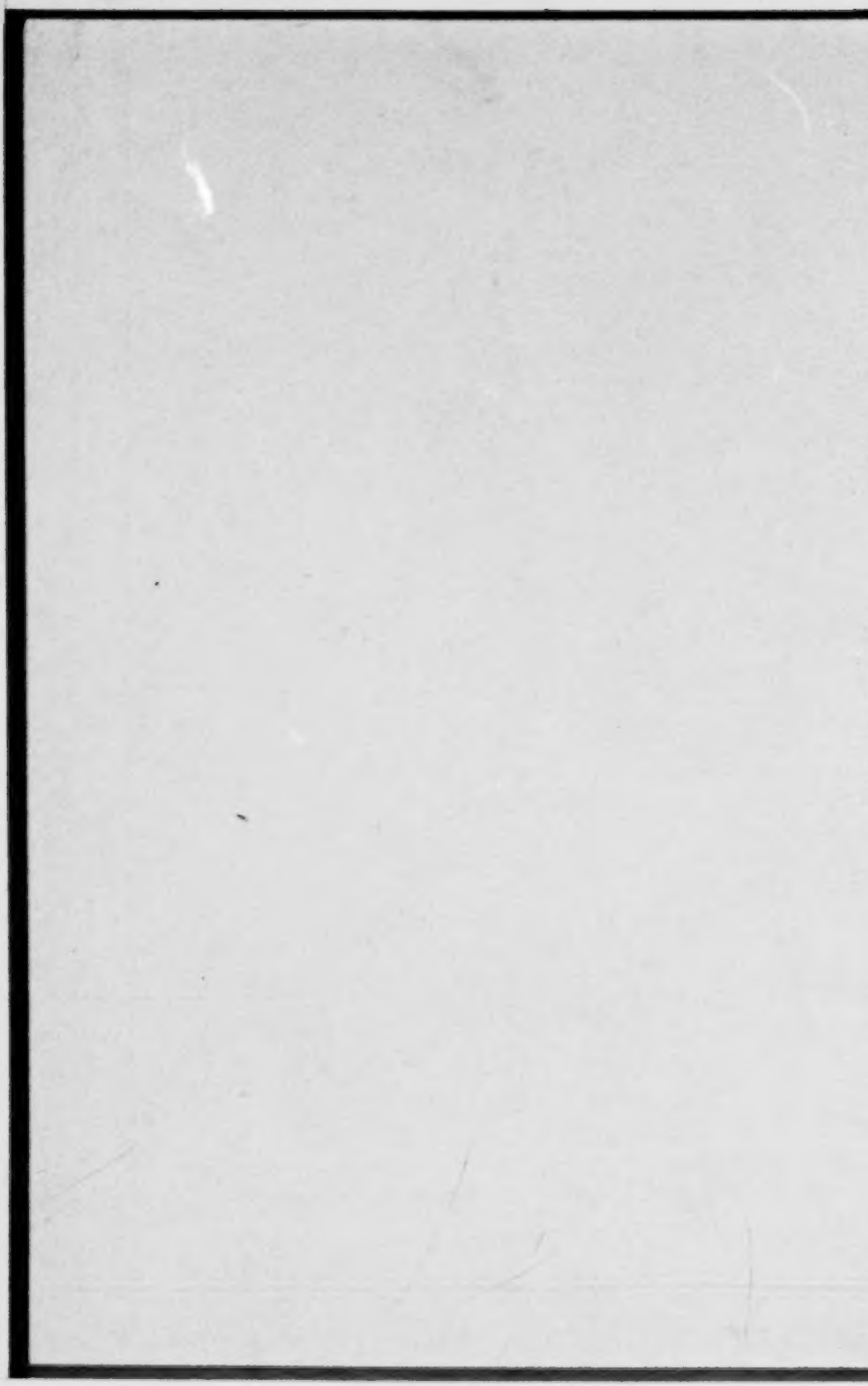

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 73-235

MARCO DEFUNIS, et al., *Petitioners,*

vs.

CHARLES ODEGAARD, et al., *Respondents.*

BRIEF OF AMICI CURIAE

the Mexican American Legal Defense and Educational Fund; the Puerto Rican Legal Defense and Education Fund; the American Civil Liberties Union; the American G.I. Forum; Aspira of America, Inc.; IMAGE; the League of United Latin American Citizens; the Puerto Rican Bar Association, Inc.; the Puerto Rican Law Students Association, Inc.; the Raza Association of Spanish-Surnamed Americans; the La Raza National Lawyers' Association; the La Raza National Law Students Association.

INTEREST OF AMICI CURIAE[1]

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to secure the civil rights of Mexican Americans through litigation and education. It is headquartered in San Francisco with additional offices

[1]Letters of consent from both petitioners and respondents have been filed with the Clerk.

in San Antonio, Los Angeles, Denver, Albuquerque and Washington, D.C. A major goal of the organization has been increasing the numbers of lawyers who are Mexican Americans.

The Puerto Rican Legal Defense and Education Fund was established in February 18, 1972, primarily to secure the civil rights of Puerto Ricans through litigation and education. It is headquartered in New York. A major goal of the organization has been increasing the numbers of lawyers who are Puerto Ricans.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization dedicated to defending the right of all persons to equal protection under the law. The ACLU has been particularly concerned with the pervasive effects of racial discrimination on American society. It is ACLU policy that:

> . . . In order to achieve genuine equality of educational opportunity colleges should apply, in respect to persons who are members of disadvantaged groups and who previously have been denied opportunity for equal educational advantage, standards and methods of evaluating applicants different from those used with other applicants, as long as these standards and methods are reasonably designed to increase equality of educational opportunity. Massive compensatory programs for educationally deprived students should be simultaneously instituted. (Enacted by the ACLU Board of Directors, December 5-6, 1970).

The American G.I. Forum is an organization composed primarily of Mexican Americans who, at the

time of its founding after World War II, saw the need to end the discriminatory social, economic and political practices which at that time pervaded this country. Although many of these practices may be considered to have become somewhat alleviated today, they are by no means eliminated. One of the principal goals of the G.I. Forum is the improvement of the educational opportunities of Latinos, particularly in higher education where, because they were almost categorically excluded, their present numbers are wholly inadequate. For this reason, the G.I. Forum strongly supports affirmative admissions programs that are designed to correct prior imbalances.

Aspira of America, Inc. is a nation-wide organization of Puerto Rican educators and students, established for the purpose of securing equal education opportunity for Puerto Ricans and other Latinos.

IMAGE is a national organization of Latinos, established for the purpose of seeking justice and equality for the Spanish speaking. The principal thrust of its program concerns government employment for the Spanish speaking. One of the principal arenas in which IMAGE seeks to implement its goals is in education, where the vestiges of past discrimination can only begin to be remedied by minority admissions programs such as the ones under scrutiny in this case.

The League of United Latin American Citizens (LULAC) is a social and cultural organization of Latinos with a nationwide membership. A primary goal for LULAC has long been to seek an end to discriminatory practices in education, a fight which

it first took up in the 1920's when it sought to end segregation in Texas schools.

The Puerto Rican Bar Association, Inc., is a membership corporation made up of attorneys who seek to promote legal reform and facilitate the administration of justice while educating Puerto Rican people with regard to the law. The Association believes that its purposes can only be carried out by increasing the number of judges and attorneys of Puerto Rican extraction, a goal which is integrally related to the issues raised in the instant litigation.

The Puerto Rican Law Students Association, Inc., is an organization composed of law students of Puerto Rican extraction. One of the principal purposes of the Association is to encourage, advise and assist Puerto Ricans in their attempts to gain entrance and maintain academic standing in law schools throughout the country. The determination of the issues raised in this case will have a substantial effect on the Association's purpose.

The Raza Association of Spanish-Surnamed Americans (RASSA) is a national organization of Spanish-speaking persons who are strongly committed to an affirmative stand on the need to remove the scars of past discrimination in education, a practice which effectively served to bar the Spanish-speaking from virtually all professions particularly the legal profession.

The La Raza National Lawyers' Association is a national bar association founded for the purpose of providing a forum for communication among attor-

neys who want to promote the social, educational and civic advancement of Spanish-speaking communities. Included among their specific goals is to file Amicus Curiae briefs in order to educate the bench to needs of the Spanish-speaking communities.

The La Raza National Law Students Association is a national organization of Spanish-speaking students currently enrolled in law schools throughout the country. Because this case is one which bears on the very future of Chicanos within the legal profession, the La Raza National Law Students Association considers it one of their most important and pressing functions to participate in the sustainment of a program which attempts, even if in limited form, to compensate for the discriminatory practices which for so long kept Latinos from higher and professional education.

INTRODUCTION AND SUMMARY

This brief is submitted on behalf of the country's major Latino civil rights and legal organizations, and the American Civil Liberties Union. This alliance has been formed for the specific purpose of providing the Court with additional information and argument in the instant case, which these amici curiae believe to be one of the most important civil rights cases to come before the Court since *Brown v. Board of Education*, 347 U.S. 483 (1954).

Both legally and factually, the instant case is the reverse of *Brown* and its progeny. Appreciation of

this fact and framework is essential to the proper resolution of the instant case.

In *Brown* and its progeny, the plaintiffs were members of certain racial and ethnic minority groups, *e.g.*, blacks and Latinos, each of which "constitute[s] an identifiable class for purposes of the Fourteenth Amendment." *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973). Marco DeFunis, Jr., is not a member of any group that has been found to be so constitutionally "identifiable"; he is an Anglo, *i.e.*, a member of the majority group.

In *Brown* and its progeny, representatives of constitutionally "identifiable" minority groups asked the courts to find that they have been the victims of unlawful discrimination, *i.e.*, racial and ethnic segregation in public schools, and to fashion appropriate remedies to eliminate this discrimination and its effects. *E.g., Keyes v. School Board Dist. No. 1, Denver, supra; Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971). Thus the courts invalidated governmental programs that had both the purpose and effect of discriminating against and perpetuating the pervasive and historical deprivation of constitutionally "identifiable" minority groups. In the instant case, an Anglo has asked the courts to find that he has been the victim of unlawful discrimination, *i.e.*, exclusion from a state law school because of purposeful inclusion of members of constitutionally "identifiable" minority groups who have (strictly) academic admissions' credentials that are ostensibly inferior to his; and he has asked the courts to enjoin this discrimination.

Thus, this case presents the Court with its first opportunity to pass upon the constitutionality of a governmental "affirmative action" program, formulated and executed by a non-judicial body, that "discriminates" in favor of historically disadvantaged racial and ethnic minority groups. The Court should take this opportunity to clarify the constitutional principle of equality, and rule that government is not barred from recognizing race and ethnicity in designing programs to eliminate from our society, "root and branch", the pervasive and historic deprivations suffered by members of these minority groups. *Cf., Green v. County School Bd. of New Kent County,* 391 U.S. 430, 437-38 (1968).

Amici curiae do not in this brief present an exhaustive argument on the constitutional issues, and they do not presume to answer all of the arguments presented on behalf of the petitioners. It is the purpose of this brief to assist the Court by showing that the respondents' affirmative action minority admission program is fully consistent with the admissions programs of virtually all accredited law schools. We also present a summary of some of the legislative facts[2] revealing the relationship between the severe discrimination and deprivation suffered by the Latino minorities in the United States and the critical shortage of Latino law students and lawyers.[3] Finally,

---

[2]On the differences between adjudicative and legislative facts, see, *e.g.*, Karst, *Legislative Facts in Constitutional Litigation,* 1960 SUP. CT. REV. 75.

[3]We anticipate that other amici and the respondents will provide such information concerning blacks and other constitutionally "identifiable" racial and ethnic minorities

we undertake to demonstrate that the decision of the Supreme Court of the State of Washington, sustaining the University of Washington's affirmative action program for the admission of law students who are minority group members, is wholly consistent with the principles of constitutional law articulated by this Court in *Brown* and its progeny, as well as in other decisions. Basically, we take the position that the petitioners and the amici curiae who support them simply have misunderstood the constitutional principle of equality, as well as the pertinent judicial precedents, including those that have already validated affirmative action programs.[4] Thus, the Supreme Court of the State of Washington was perfectly correct in ruling that the respondents' actions are constitutional.[5]

ARGUMENT

I

THE FACTS IN THIS CASE REVEAL THAT THE RESPONDENT MARCO DeFUNIS, JR., WAS DENIED ADMISSION TO THE UNIVERSITY OF WASHINGTON SCHOOL OF LAW PURSUANT TO ADMISSIONS POLICIES AND PROCEDURES THAT ARE VALID IN THAT THEY ARE WHOLLY CONSISTENT WITH THE ADMISSIONS POLICIES AND PROCEDURES AT MOST ACCREDITED LAW SCHOOLS.

Marco DeFunis, Jr., was twice denied admission to the University of Washington School of Law even

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[4]See notably, the briefs amicus curiae of the Anti-Defamation League of B'nai B'rith and of the American Jewish Congress.

[5]The opinion of the Supreme Court of the State of Washington is reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

though his strictly academic credentials yielded a mathematically projected first year average (PFYA) that was superior to those projected for a substantial number of students who were admitted. (They were also inferior to those of a large number of applicants who also were not admitted.) Many of these students were members of racial and ethnic minority groups. Significantly, however, many of these students were not minority group members. As the court below found:

> Because of the judgmental factor in the [Law School's] admission process . . . the ultimate determination of applicants to whom admission was offered did not follow exactly the relative ranking of PFYAs. Of those invited, 74 had lower PFYAs than plaintiff; 36 of those were minority applicants; 22 were returning from military service; and 16 were applicants judged by the [admission] committee as deserving invitation on the basis of other information contained in their files. Twenty-nine applicants with higher PFYAs than plaintiff's were denied admission. Of the 36 minority group students invited 18 actually enrolled in the first-year class.
>
> 507 P.2d at 1176. *Accord:* Appendix at 50.

Suffice it to say, special consideration was given to the applications of minority group students; students *apparently* less qualified than the petitioner, Marco DeFunis, Jr., in that their strictly academic credentials apparently were not as good as his, were admitted to the law school largely because they were members of minority groups. However, many of these minority group students were first screened through

special compensatory summer programs, operated primarily by the Council on Legal Education Opportunity. 507 P.2d at 1176 n. 5. Further, other students who are not minority group members but who were also *apparently* less qualified than petitioner, Marco DeFunis, Jr., were also admitted.

The admissions criteria and procedures employed by the respondents are fully described in the opinion of the court below and need not be elaborated in this brief. They appear to be very complex. This is not surprising. Law school admissions are a complicated process. See *e.g.*, Goolsby, *A Study of the Criteria for Legal Education and Admission to the Bar,* 20 J. LEGAL ED. 175 (1968); O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L. J. 699 (1971) [hereinafter, O'Neil, 80 YALE L. J. at .....]; O'Neil, *Preferential Admissions: Equalizing Access to Legal Education,* 1970 TOLEDO L. REV. 281 [hereinafter, O'Neil, 1970 TOLEDO L. REV., at .....]. Decisions regarding admission simply are not made at law schools accredited by the American Bar Association and the Association of American Law Schools on the basis of a mechanical rank-order which is determined by evaluation only of traditional academic credentials, *i.e.*, college grade point average and Law School Admission Test score. The admissions process is archetypical of those decision-making processes described by Professor Fuller as polycentric. The factors involved are so many and diffuse that these decisions are generally unsuited for adjudication; they also cannot be resolved satisfactorily by wholly mechanical or random

approaches. Sensitive, relatively discretionary processes, rather like enterprise management, are required. Fuller, *Collective Bargaining and The Arbitrator,* 1963 WISC. L. REV. 3.

Thus, the criteria and procedures applied by the University of Washington's School of Law admissions committee are subtle and multifaceted. But they do not differ in this respect from those applied by virtually every law school in the country accredited by the ABA or the AALS. See, *e.g.,* O'Neil, 80 YALE L. J. 699 (1971); O'Neil 1970 TOLEDO L. REV. 281.

The criteria employed by the respondents when this lawsuit commenced were publicly stated. While we could quibble with their formulation, they are reasonably clearly defined, to the extent that any such criteria can be clearly defined:

> In assessing applications, we began by trying to identify applicants who had the potential for outstanding performance in law school. We attempted to select applicants for admission from that group on the basis of their ability to make significant contributions to law school classes and to the community at large.
>
> We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

> An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.
>
> We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions.

(Defendants' Exh. 45.)

It is beyond dispute that use of criteria in addition to strict academic credentials is appropriate if a humanistic influence is to be employed in the law school admissions process. Indeed, given the lack of precision of the traditional academic credentials as predictors of performance in law school, the likelihood that they are culturally biased and not validated, and their tendency to over-exclude minority group members,[6] resort to additional criteria or to affirmative action admissions programs may well be obligatory. That issue, however, is not before the Court. As the Supreme Court of the State of Washington ruled:

> . . . [T]he question before us is not whether the Fourteenth Amendment *requires* the law school to take affirmative action to eliminate the con-

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[6]See, e.g., O'Neil, 1970 TOLEDO L. REV. 281; O'Neil, 80 YALE L. J. 699 (1971); Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 1970 TOLEDO L. REV. 321 [hereinafter, Rosen, 1970 TOLEDO L. REV. at .....].

> tinuing effects of de facto segregation; the question is whether the Constitution *permits* the law school to remedy racial imbalance through its minority admissions policy.

507 P.2d at 1183.[7]

Like the University of Washington School of Law, most accredited law schools attempt to select students on the basis of predications indicating not only that they will get good grades in law school but also that they will "make significant contributions [both] to law school classes and to the community at large." To assure that students have the service potential, law schools apply all manner of "non-academic" considerations in admissions.

Residency, for example, is a common non-academic criterion. So-called national law schools frequently prefer applicants from outlying states over applicants residing or attending school in states located near the given law school, thereby better serving the national "community." On the other hand, many other law schools, especially state law schools, are required by statute or regents' rules to favor state residents, thereby better serving the state's "community." State law schools in turn frequently favor applicants from rural areas of the state over those from the cities. As a justification for using varying standards for

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[7]The validity of traditional academic admissions criteria also need not be reviewed by this Court. See 507 P.2d at 1183 n. 13. If these questions were to be decided, the Law School Admissions Test and law school testing procedures might well not pass muster under standards such as those articulated by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

admitting law students from different parts of the state, law schools cite the need for geographical diversity. Relative to population in various areas of the state, law schools receive fewer applications from rural residents than from urban dwellers. Hence, they are less rigorous in applying traditional academic criteria to rural applicants, thereby preferring them for admission. The law schools believe that this kind of a "preferential" approach best serves the entire state and all of its communities, by increasing the likelihood that rural areas will be adequately staffed with lawyers. See generally, O'Neil, *supra*, 80 YALE L. J. at 703-05.

The University of Washington School of Law's Guide for Applicants states that "An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." (Defendants' Exh. 45.) This approach is well within the parameters of nearly universal law school admissions policies. At present, virtually all of the ABA and AALS accredited law schools in the United States consider such racial and ethnic factors in making admissions decisions. In fact, they clearly tend to favor applicants from disadvantaged racial and ethnic minority groups over other applicants. See, *e.g.*, Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069; Rosen, 1970 TOLEDO L. REV. at 326; *The Law Schools and the Minority Group Law Students, A Survey for the Association of American Law Schools Committee on Minority Groups*, PROCEEDINGS OF THE 1970 ANNUAL

MEETING OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, §II, p. 1. The reasons for use of such racial and ethnic criteria are almost precisely the same as the reasons for application of criteria relating to residency. The law schools are seeking to admit and train a diverse group of students who will be able "to make significant contributions to law school classes and to the community at large."

By applying racial and ethnic criteria, law schools (and the organized bar) are now recognizing that ghettos, *barrios*[8] and minority group communities, wherever they are found, are grossly underserved by the law schools and the legal profession.[9] Similarly, just as relatively few applications are received from dwellers in the rural portions of a state compared to the rural population, relatively few applications are received from members of the minority group communities. Law schools are also recognizing that the effect of rigid application of traditional academic admissions criteria clearly is to over-exclude from law schools members of constitutionally identifiable minority groups. *See, e.g.*, Consalus, *The Law School Admission Test*, 1970 TOLEDO L. REV. 501. Finally, there is now a great deal more than a suspicion that these criteria are either culturally biased or insuffi-

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[8]*Barrio* is a Spanish word denoting a predominantly Mexican American, Puerto Rican or Latino area analogous to a ghetto. See, *e.g., White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973).

[9]In addition to what follows in this brief, extensive data are provided in Gellhorn, *The Law School and the Negro, supra*, and Symposium, 1970 TOLEDO L. REV. 277-986. These materials also canvass the reasons for and the consequences of this paucity of minority group lawyers.

ciently validated to justify exclusive reliance upon them, especially in view of the deprivations and discrimination generally imposed by our society on minority groups and their members. *See, e.g.*, Rosen, 1970 TOLEDO L. REV. at 322-336.

On the facts, then, the respondents' minority admission program is archetypical of, and fully consistent with, the admissions processes extant at virtually all accredited law schools.

II

THE COURT BELOW PROPERLY SUSTAINED THE RESPONDENTS' AFFIRMATIVE ACTION PROGRAM FOR MINORITY GROUP ADMISSIONS ON THE BASIS OF THE CLEAR FACTS OF THE PERVASIVE AND HISTORIC DISCRIMINATION AND DEPRIVATION THAT CONSTITUTIONALLY IDENTIFIABLE RACIAL AND ETHNIC MINORITIES CONTINUE TO SUFFER AND THE RELATIONSHIP BETWEEN THIS DISCRIMINATION AND THE CRITICAL SHORTAGE OF MEMBERS OF THESE MINORITY GROUPS IN THE LEGAL PROFESSION.

The sordid history of the origins of black immigration to the United States need not be recited here. The continued deprivations suffered to this day by blacks are familiar enough to this Court. They are the primary subject of *Brown v. Board of Education* and its progeny. Suffice it to say, within the legal profession, the imbalance against blacks is as deplorable as it is within any of the significant institutions of our society. Further, the relationship between this imbalance, and discrimination and deprivation suffered by blacks throughout society is patent. See, *e.g.*,

Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L. J. 1069.

The history of the discrimination and deprivations suffered by Latinos has been brought much less frequently to the attention of this Court.[10] Although the Court has recently had occasion to address the facts of this deprivation,[11] additional recitation is appropriate.

According to the United States census, there are at least 10.6 million "persons of Spanish origin" in the United States. There may well be a larger number of such persons, for there is considerable evidence that this class was grossly undercounted in the 1970 census. Indeed, the 10.6 million figure was arrived at as a correction by the government of its first estimate of 9.2 million.[12] Even accepting the government's present count, Latinos constitute the second largest

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[10]Several of the amici curiae supporting the petitioners have intimated that the record is devoid of evidence of these "legislative" facts, and there are no materials outside the record bearing upon these facts that might be suitable for judicial notice. See, *e.g., Brief of the Anti-Defamation League of B'nai B'rith as Amicus Curiae*, pp. 10-13. We disagree with this assessment of the record. Further, we submit that the facts of racial and ethnic deprivation, the continued racial and ethnic imbalance in the legal profession, and the relationship between the two are sufficiently notorious for the courts to take judicial notice of them. See *Ho Ah Kow v. Nunan*, 12 Fed. Case. 252, 255 (No. 6546) (C.D.C. Cal. 1879) (Field, J.). Such facts were considered, of course, in *Brown v. Board of Education*, 347 U.S. 483 (1954). See, Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421 (1960).

[11]*E.g., Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686 (1973); *White v. Regester*, 93 S.Ct. 2332 (1973); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[12]United States Dep't of Commerce, *Current Population Characteristics, Persons of Spanish Origin in the United States: March 1973 (Advance Report)*, Series P-20 No. 259, Jan. 1974.

minority in the United States subject to historic and pervasive patterns of segregation and invidious discrimination.

According to the census there are four major groups of "persons of Spanish origin" in this country: Mexican Americans or Chicanos (6.3 million), Puerto Ricans or Boricuas (1.5 million), Cubans (0.7 million) and persons of "Central or South American or other Spanish origin" (2.0 million). Within the total group of Latinos, Chicanos and Boricuas have suffered most from segregation and discrimination.

Mexican Americans comprise the largest minority west of the Mississippi River; they are settled predominantly in the Western part of the United States, with large population centers from Chicago to San Francisco. They are most numerous in the Southwest, comprising Arizona, California, Colorado, New Mexico and Texas. In fact, they have lived in the Southwest for over 400 years. During the 1500's the Spanish began to settle this area. At the time Jamestown was settled in 1607, Santa Fe, New Mexico, had already been functioning as the capital of the Spanish territory of Nuevo Santander for twenty years.

The territory comprising the Southwestern states passed from Spanish rule to Mexican sovereignty in 1821, when Mexico declared its independence from Spain. Severe internal problems resulted in the secession of Texas from Mexico, by means of a rebellion or civil war, in 1836. Nearly a decade later, although Texas' independence was still in contest, the United States Congress authorized the admission of Texas

into the Union. Armed conflict ensued between Mexico and the United States culminating in the War of 1846 which was won by the United States.

Following the War, the United States annexed half of Mexico's total territory including Texas and the remainder of the Southwest, the territory from which the States of California, Arizona, Colorado and New Mexico are derived. The Treaty of Guadalupe Hidalgo, signed on February 2, 1848, codified the annexation of the Southwestern lands. Technically the Treaty, by protocol, guaranteed both the civil and property rights of those former citizens of Mexico, residing in the annexed territories, who agreed to become United States citizens. Not surprisingly, however, in actual operation the Treaty failed to protect Chicanos. After the War of 1846, they fell victim to all of the misfortunes endured by a conquered people. They enjoyed few advantages of United States citizenship, and they were placed behind the Anglos in all realms of social, economic and political activity.

Following the War of 1846, approximately 75,000 Mexicanos chose to receive United States citizenship. Their numbers have been augmented by additional immigrants from Mexico, who entered in three major waves.

First, around the turn of the century, a relatively small number of immigrants came to work in mining, railroad construction and other such laboring fields.[13]

[13]Grebler, Moore & Guzmán, THE MEXICAN AMERICAN PEOPLE (1970), p. 63.

Immigrants from Asia supplied most of the labor employed in Southwestern agriculture at that time.

Second, the largest wave of Mexican immigration to this country occurred during the turmoil of the Mexican revolution, commencing around 1908. These immigrants and their descendants provided the population base for most present day Mexican American communities in the Southwest.[14] Immigrants were also drawn to the United States by the prosperity of the 1920's. However, they were funneled into farm labor work as the supply of Asian labor diminished.[15] During this period, Mexicans comprised nearly 10% of the legal migration to the United States.[16] The number of illegal immigrants that entered during this prosperous period of American history will never be known.

During the depression immigration decreased drastically. In addition, persons of Mexican descent, citizens as well as aliens, were brutally repatriated to Mexico. Cattle cars rolled out of the midwest and all parts of the Southwest ladened with human cargo. Many United States citizens of Mexican descent died on the parched deserts of Northern Mexico, while others were to return years later to their homes and families in their native United States.[17]

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[14]Meier & Rivera, THE CHICANOS: A HISTORY OF MEXICAN AMERICANS, p. 135.

[15]*Mexicans in California*, Report of Governor C. C. Young's Mexican Fact-finding Committee 1930 (Reprint, San Francisco, California 1970) p. 171.

[16]Grebler, *et al.*, *supra*, note 13, p. 64.

[17]See C. McWilliams, NORTH FROM MEXICO (1948).

Third, the 1950's once again saw a massive increase of emigration from Mexico to this country. In the second half of the 1950's nearly 15% of all legal immigrants to the United States came from Mexico.[18] In addition, Congress reinstituted the "bracero" program at the urging of the agricultural interests, causing a great increase in temporary migrations.[19] However, the same conditions which prompted use of "braceros" —low wages, poor working conditions, inadequate housing—made it attractive for American farmers to hire illegal aliens. As a result, there was also a flood of illegal aliens. The Immigration and Naturalization Service reported that, in the early 1950's, 3.8 million illegal Mexican aliens were expelled from the United States.[20] The number of illegal aliens who remained in the United States, during this period, will never be known; nor will the number of citizen offspring born to the illegal aliens.

For obvious historic reasons and because of their proximity to the border, the five states taken by conquest from Mexico have absorbed most Mexican Americans. More recently, however, Mexican Americans have migrated north to midwestern cities in search of work. Consequently, there are over 200,000 Chicanos now residing in, for example, Chicago, Illinois and Lansing, Michigan.

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[18]Grebler, *et al.*, *supra*, note 13, p. 67.

[19]The bracero program under Public Law 78 allowed contract labor to be brought from Mexico to the United States to do farm work during the appropriate growing and harvesting seasons.

[20]Grebler, *et al.*, *supra*, note 13, p. 521.

In many respects the background of Puerto Rican migration to the mainland United States is similar to that of Mexican Americans. Nearly a century before the settlement of Jamestown, Spanish settlers were building a cathedral in San Juan. And Puerto Ricans, too, became subject to the United States sovereignty as a result of a war. The Island of Puerto Rico was ceded by Spain to the United States in 1898 as one of the spoils of the Spanish-American War.

In 1917, the Jones Act, 48 U.S.C. § 731, *et seq.*, declared that all residents of Puerto Rico are citizens of the United States. Puerto Rico now has commonwealth status with the United States. *See,* e.g., Cabranes, *The Status of Puerto Rico,* 16 INT'L & COMP. L. Q. 531 (1967). Consistent with the concept of United States citizenship, residents of Puerto Rico have the right to travel freely to and from the United States and to settle here. *Balzac v. Porto Rico,* 258 U.S. 298 (1922). The other rights and benefits of United States citizenship, mandated by the Constitution and federal statutes, notoriously have not been freely enjoyed by Puerto Rican residents of the United States.

Large numbers of Puerto Ricans have, however, migrated from Puerto Rico to the United States. The reasons for the migration are very similar to those leading to the immigration of Mexican Americans during the Twentieth Century. By and large these Puerto Ricans were seeking jobs and an improved standard of living.

The major migration of Puerto Ricans has taken place in recent years. For example, between 1950 and 1960 nearly 400,000 persons migrated from Puerto Rico to the United States.[21] As a result, there are presently an estimated one and one-half million to two million Puerto Ricans residing in this country. Of these, slightly over one million are in New York, the disembarking place for Puerto Ricans since migration began. There are, however, significant and growing numbers of Puerto Ricans in Connecticut, Massachusetts, New Jersey, Pennsylvania, Illinois, and Florida.

If these large masses of Latino people had become integrated into American society as had ethnic groups from Europe, they would be entitled to no special standing under the Equal Protection provisions of the United States Constitution. As a *class* they would not continue to be subjected to pervasive and invidious discrimination. See Point III, *infra*.

For many reasons, however, Mexican Americans, Puerto Ricans and other Latinos have remained outside of the American "Melting Pot," and continue as a class to be subjected to pervasive discrimination. First, White America for its own reasons, perceives of and treats these peoples as though they were nonwhite. (One reason for this treatment may be the fact that the gene pool from which Mexican Americans, Puerto Ricans and other people from Latin

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[21] *Puerto Ricans in the United States, United States Census of 1960* PC 2; ID Table A, p. viii.

American descend includes American Indians and blacks as well as caucasians.)[22]

Second, there is a continuous infusion of Mexican and Puerto Rican culture into this country because of the high level of immigration from Mexico and of migration from Puerto Rico. Indeed, there is a constant migration back and forth between Puerto Rico and the United States, and the border between Mexico and the United States is extremely fluid.

Third, Mexican Americans have suffered the same type of social, economic and political discrimination as have blacks. Public schools have been segregated, *Keyes v. School Dist. No. 1, Denver,* 93 S.Ct. 2686, 2691-92 (1973); *Cisneros v. Corpus Christi I.S.D.,* 459 F.2d 13 (5th Cir. 1972); *Mendez v. Westminster,* 161 F.2d 774 (9th Cir. 1948). *See generally,* Comment, *Project Report: Segregation of Chicanos in Texas Schools,* 7 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 307 (1972). Political rights have been denied, *Graves v. Barnes,* 343 F. Supp. 704 (W.D. Tex. 1972), aff'd *sub nom., White v. Regester,* 93 S.Ct. 2332, 2340-41 (1973); *Castro v. State,* 2 Cal.3d 223, 85 Cal.Rptr. 20, 466 P.2d 244 (1970). Employment discrimination has been the rule. Social barriers were erected, perhaps epitomized by the separate washroom facilities described in *Hernandez v. Texas,* 347 U.S. 475 (1954).

Puerto Ricans suffer from precisely the same kinds of deprivations. See, *e.g., Katzenbach v. Morgan,* 384

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[22]See H. Driver, *Indians of North America* 602 (1961); Forbes, *Race and Color in Mexican-American Problems,* 16 J. HUM. REL. 57 (1968).

U.S. 641, 652-54 (1966). Indeed, by every socio-economic gauge, including the 1970 census, Puerto Ricans are the most deprived minority group in the United States. They are the least educated, the least employed, and the least paid. *See* Cabranes, *Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education,* 25 J. LEGAL ED. 447, 449-51 (1973) [hereinafter, Cabranes, 25 J. LEGAL ED. at ——]. Not surprisingly, they are also the targets of severe discrimination in such areas as employment, voting rights, education, and housing. *E.g. Katzenbach v. Morgan, supra.*

Fourth, this discrimination has created insulated Mexican American communities in large cities such as San Antonio, see *White v. Regester, supra,* and Los Angeles;[23] it has created similar insulated Puerto Rican communities in several large Northeastern cities, such as New York, Newark and Boston. Even in the small towns the barrio tends to be isolated from the rest of the community.[24] This cultural isolation has fostered retention of the Spanish language, and Chicano and Puerto Rican cultures. Since children learn Spanish at home and do not socialize with English-speaking children at school, the need and opportunity to speak English is minimal.[25]

[23]One author has characterized the Mexican American's position in Los Angeles as follows: "Unassimilated, unwelcome, unprotected, these people were so thoroughly isolated that the American majority was able to maintain its untainted version of an integrated community." R. Fogelson, THE FRAGMENTED METROPOLIS: LOS ANGELES, 1850-1930 (1967).

[24]H. T. Manuel, THE EDUCATION OF MEXICAN AND SPANISH-SPEAKING CHILDREN IN TEXAS (1930) p. 18.

[25]P. Kibbe, LATIN AMERICANS IN TEXAS (1946) pp. 82-103.

Certainly as compared to most other ethnic groups, there is within the Chicano and Boricua communities a desire to maintain the use of the mother tongue. Examples of the continued desire to hold onto Spanish are the numerous television and radio stations broadcasting in Spanish throughout the country and the importation of Spanish language films.

With this history of constant immigration and migration, discrimination and isolation, the continued use of Spanish and retention of quite separate cultures, is understandable. A study conducted by the Mexican American Study Project at UCLA and later published in Grebler, *et al.*, THE MEXICAN AMERICAN PEOPLE, *supra*, n. 13, at 425, reported that almost half of the sample of low-income Mexican Americans in Los Angeles, and a greater percentage in San Antonio had trouble with English. According to one recent study, 72.1 percent of Puerto Ricans in the mainland United States speak Spanish as their first language.[26] Even in Minnesota, where there are few Latinos, Spanish is spoken.[27]

Although the need for legal representation of Latinos is clear, the problems they confront are compounded by the sparse number of Latino attorneys and judges in the United States. It has always been difficult to tabulate the precise number of Latino or Spanish-surnamed lawyers throughout the country. To

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[26]United States Dep't of Commerce Bureau of the Census; *Persons of Spanish origin in the United States;* November 1969 (Feb., 1971) p. 20.

[27]W. Moquín, A DOCUMENTARY HISTORY OF MEXICAN AMERICANS (1971) p. 330.

the best of our knowledge no national census has been published. However, a number of surveys have been conducted from which projections can be made. They reveal gross underrepresentation of Latinos at all levels of the legal profession.

One survey, based upon the 1968 Northern and Southern California Legal Directories, indicated that there were only 228 Spanish surnamed attorneys in the State of California, constituting merely one percent of the state's 29,409 licensed attorneys. "The ratio of Anglo Attorneys to Anglo citizens was 1 to 530, while the ratio of Spanish-surnamed attorneys to Spanish-surnamed citizens was 1 to 9,482." Reynoso, *et al., La Raza, the Law and the Law Schools,* 1970 TOLEDO L. REV. 809, 816 (footnote omitted). In 1967 at least ten percent of the population of the City and County of Denver was Latino. "Yet only ten of the 2,000 attorneys practicing there (one half of one percent) have Spanish surnames. . . ." O'Neil, 1970 TOLEDO L. REV. at 298; O'Neil, 80 YALE L. J. at 727 (1971). According to a 1973 survey taken by the Puerto Rican Legal Defense & Education Fund, there are approximately three Puerto Rican practicing attorneys in Pennsylvania, five in New Jersey, three in Connecticut, three in Illinois, sixty in New York, and one in Massachusetts. *See* Cabranes, *supra,* 25 J. LEGAL ED. at 449-50.

The figures for Latino representation on the judiciary are equally bleak. In the mainland United States, there are only two or three federal judges who are Spanish surnamed. One is Mexican Ameri-

can, and none is Puerto Rican. The same pattern is repeated in the state judiciary. In 1970, the United States Civil Rights Commission reported that:

> Of the total of 961 judges serving on State courts in the five States [of the Southwest when Chicanos constitute 15% or more of the population] only 32 or 3.0 percent are Spanish surnamed. There are 32 supreme court justices in the five States. Only one of these, the chief justice of New Mexico, is Spanish surnamed.
>
> At the State court trial level, there are a total of 746 judges; 26 are Spanish surnamed. California has seven, Colorado three, New Mexico 14, Texas two, Arizona none.

Mexican Americans and the Administration of Justice in the Southwest: A Report of the United States Commission on Civil Rights, March 1970, p. 84.

Recently, there has been notable increase in the number of Latino lawyers, and some increase in the numbers of Latino judges. These increases have not been so great as to bring the percentages of Latino lawyers and judges even reasonably close to parity in relation to the percentage of Latinos in the general population. These increases have resulted in large part from the recent movement within the law schools of the mainland United States to increase their enrollment of law students who are members of historically deprived minority groups. The number of Chicano law students in 1973-74 has tripled since 1969-70, the number of Boricua law students has also tripled, and the number of other Latino law students has

more than quadrupled. Thus, currently there are 1,259 Chicanos, 180 Boricuas, and 261 other Latino law students enrolled in the accredited law schools of the mainland United States.[28] On the other hand, the total number of law students enrolled in 1973-74 has almost doubled since 1969-70 to a figure of 106,102.[29] Hence the relative proportion of Latino law students has less than doubled since 1969. It now stands at approximately one and one-half percent, although Latinos constitute over five percent of the United States' population.

The facts are clear: a critical racial and ethnic imbalance continues throughout the entire legal profession. We do not suggest that the legal profession must reflect absolute parity with the general population. However, continuation of the existing gross imbalance has deleterious effects on both minority groups and their members, and society as a whole. Thus there are compelling reasons for taking affirmative steps to reduce this imbalance as rapidly as possible. And it was for these reasons that the Supreme Court of the State of Washington upheld the respondents' affirmative action program. 507 P.2d at 1182-84.

These programs are constitutional because they are necessary to secure the rights of individual Latinos, and members of other minorities, who belong to classes

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[28] *1973 Survey of Minority Group Students in Legal Education*, collected by Millard H. Ruud, then Consultant on Legal Education to the American Bar Association, which is attached to this brief as Appendix A.

[29] See *Legal Education and Bar Admission Statistics* 1963-1973, attached to this brief as Appendix B.

that historically have been subject to gross and comprehensive discrimination and deprivations. The vast majority of people belonging to these minority groups have systematically been denied equal educational opportunity, and otherwise have suffered great deprivations. It simply is not right to judge such applicants solely by the traditional admissions criteria, such as college grade point average and Law School Admission Test score, especially since the traditional admissions criteria have not been validated, and they are probably culturally biased. To do justice to individual minority group members, therefore, it follows that this Court should validate the respondents' good faith program to evaluate minority group applicants on alternative bases.

Additional reasons why government has a compelling interest in increasing the number of lawyers from historically deprived minority groups have been well stated by Professor O'Neil. "First, all surveys of the need for counsel confirm that poor people—of whom minority groups constitute a disproportionate share—find legal services inaccessible, inadequate, and inhospitable." O'Neil, 1970 TOLEDO L. REV. at 296-97. Indeed, one of the most direct and immediate impacts of the absence of Latino lawyers is on the Latino communities. We do not, of course, suggest that no Anglo lawyers are willing or capable of assisting minority group members, that all minority group lawyers are willing or able to donate or use their time or otherwise work to remedy the conditions of the poor and oppressed, or that we should expect all minority

group lawyers to so employ themselves. However, especially in those portions of the community where minority group members most need legal assistance, "particularly where the case is a controversial one or is potentially divisive along racial lines, white attorneys may be neither able nor willing to take it on even if they are practicing in the area and ready to handle some legal problems of the" minority community. O'Neil, 1970 TOLEDO L. REV. at 297.

Even when Anglo lawyers are able and willing to represent minority group members,

> . . . the white or Anglo lawyer is far less likely than the man who comes from the ghetto or the barrio to understand the background of the case, to be able to locate and interview witnesses, to gather material evidence within the community, and so on. Certain tasks can be performed best (and sometimes only) by one who knows the community and its people.

O'Neil, 1970 TOLEDO L. REV. at 297.

Especially when a lawyer is called upon to deal with members of Latino communities, frequently it is important that the lawyer himself be a member of that community.

> The client's ability to communicate freely and fully with his attorney is as vital as the actual availability of an attorney. Clearly racial or ethnic identity between lawyer and client will enhance or promote such communication. Where the client's basic tongue is Spanish, the advantage of an attorney fluent in that language is plainly apparent.

O'Neil, 1970 TOLEDO L. REV. at 297-98.

Thus as litigants and clients, members of the Latino communities, the vast majority of whom speak Spanish as their first or only tongue, need access to lawyers with whom they can communicate. All too often, non-English speaking Latinos have no lawyers available to explain to them their rights and duties under the law. This language problem in legal proceedings has gained increased recognition in the courts. See, *e.g., United States ex rel. Negrón v. New York,* 434 F.2d 386 (2d Cir. 1970); *Ex parte Muraviov,* 192 Cal.App.2d 604, 13 Cal.Rptr. 466 (1961); *State v. Vásquez,* 101 Utah 444, 121 P.2d 903 (1942).[30]

Apart from the needs of individual Latino litigants and clients for increased numbers of Latino lawyers, there are additional societal needs to be considered. Participation of Latino lawyers in the resolution of legal disputes in which the Latino communities have an interest makes both realistic solutions and the acceptibility of those solutions by the Latino communities more likely. Further, additional Latino lawyers

[30]In addition, numerous courts have now also ordered election officials to provide information in languages other than English, *E.g., López v. Dinkins,* No. 73 Civ. 695, ... F. Supp. ..... (S.D. N.Y. March 21, 1973); *Puerto Rican Organization for Political Action v. Kusper,* 350 F. Supp. 606 (N.D. Ill. 1972), aff'd, ... F.2d ..... (7th Cir. Dec. 18, 1973, No. 73-1035); *Castro v. State,* 2 Cal.2d 223, 85 Cal.Rptr. 20, 466 P.2d 244 (1970). In its present Term, this Court ruled that San Francisco's failure to provide bilingual education to students of Chinese ancestry who do not speak English denies them a meaningful opportunity to participate in public education and thus violates Title VI of the Civil Rights Act of 1964. *Lau v. Nichols,* ..... U.S. ....., 42 U.S. L. WEEK 4165 (No. 72-6520, Jan. 21, 1974). See *Serna v. Portales Municipal Schools,* 351 F. Supp. 1279 (D.N.M. 1972), on appeal to the 10th Cir. No. 73-1737 (where the district court reached a *Lau* result under the Fourteenth Amendment).

would make important intellectual contributions to the legal profession and provide the profession with valuable input concerning their communities' needs and perspectives. "Lawyers exercise disproportionate power and influence at all levels of government. It stands to reason that expanding the portion of the bar that is black or Spanish-surnamed will also increase the political impact of the community these new lawyers represent and from which they come." O'Neil, 1970 TOLEDO L. REV. at 299.

Finally, the law is a respected and highly visible profession. In a nation dedicated to the principle of equality under law, the presence in the profession of substantial numbers of minority group persons serves valuable additional functions. It shows that the principle of equality is not purely theoretical. It demonstrates to young members of minority groups that they have a real opportunity for advancement and for productive lives and to change that which is oppressive in our society through existing institutions.

III

THE UNIVERSITY OF WASHINGTON SCHOOL OF LAW'S AFFIRMATIVE ACTION PROGRAM FOR THE ADMISSION OF STUDENTS WHO ARE MEMBERS OF CONSTITUTIONALLY IDENTIFIABLE MINORITY GROUPS DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF NON-MINORITY GROUP STUDENTS WHO ARE NOT ADMITTED TO THE LAW SCHOOL EVEN THOUGH THEIR STRICTLY ACADEMIC CREDENTIALS ARE SUPERIOR TO THOSE OF THE MINORITY GROUP STUDENTS.

The ultimate constitutional questions in this case can be stated in many forms. For our purposes, two will suffice: Does the Equal Protection Clause of the Fourteenth Amendment require that all governmental programs initiated by non-judicial agencies be "color blind"? Does consideration of race and ethnic background in attempts by non-judicial agencies of government to correct racial and ethnic inequalities and imbalances violate the Fourteenth Amendment? The answer to each of these questions is no.

The notion that the Constitution is "color blind" was initially put forward by the first Justice Harlan in his dissent in *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896), where he declared:

> But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Justice Harlan was protesting, by his dissent, this Court's legitimization of racial segregation through adoption of the "separate but equal" test. Inadvertently, however, he laid the groundwork for the argu-

ments of those who oppose remedial or preferential treatment of minority group members, now that segregation has been declared unconstitutional, even though both the purpose and the effect of this treatment is to bring about both integration and a realistic equal opportunity for members of disadvantaged minority groups.

However, this Court has never declared that all racial distinctions and classifications are per se unconstitutional. At most the Court has ruled that they are "suspect," carry a "very heavy burden of justification," and are subject "to the most rigid scrutiny." *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Loving v. Virginia,* 388 U.S. 1, 9 (1967); *McLaughlin v. Florida,* 379 U.S. 184 (1964). The Court has even studiously declined recent invitations by Justices Douglas and Stewart, concurring in the *Loving,* 388 U.S. at 13, and *McLaughlin,* 379 U.S. at 198, cases, to declare a *per se* rule of unconstitutionality when criminal sanctions are to be imposed on the basis of "the race of the actor."

We submit that there is a good reason for the Court's apparent reticence. Laws and practices which have the purpose and effect of continuing or increasing the burdens on members of racial and ethnic minority groups, that have been subjected to historic and pervasive discrimination, are unconstitutional. On the other hand, laws and practices which have the purpose and effect of promoting integration and true equality of opportunity for members of such minority groups are constitutional.

In approaching the question of whether a law violates the Equal Protection Clause, this Court has articulated a tripartite analysis:

> To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification. [Citation omitted.] In considering laws challenged under the Equal Protection Clause, this Court has evolved more than one test, depending upon the interested affected or the classification involved.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (footnote omitted).[31] Thus, where the basis for a classification is one that has been denominated by the Court to be "inherently suspect" or the individual interest affected is a "fundamental" constitutional right, the Court's standard of review is "exacting" (405 U.S. at 338) and "the Court must determine whether the exclusions are necessary to promote a compelling state interest" (405 U.S. at 437). Where the basis for the classification is not inherently "suspect" and the individual interest affected is not a "fundamental" constitutional right, the Court has held that ". . . the traditional standard of review . . . requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio*

[31]By "the character of the classification," the Court means "the basis for the classification," *e.g.*, recent interstate travel, race, national origin, alienage, sex. 405 U.S. at 335.

Independent School District v. Rodríguez, 93 S.Ct. 1278, 1301 (1973). *Cf. Dunn v. Blumstein*, 405 U.S. 330 (1972).

Although the *amici curiae* believe the Court was in error, a bare majority of the Court appears to have ruled that education is not a fundamental constitutional right, deprivation of which triggers the "exacting" "rigid scrutiny" standard. *San Antonio Independent School District v. Rodríguez, supra*, 93 S.Ct. at 1297-99; *id.*, 93 S.Ct. at 1311 (Stewart, J. concurring). At the very most, this majority conceded that ". . . some identifiable quantum of education . . . [might be] a constitutionally protected prerequisite to the meaningful exercise of . . . First Amendment freedoms and to intelligent utilization of the right to vote" 93 S.Ct. at 1298. Under that analysis, it is highly unlikely that enjoyment of a public legal education fits within the "identifiable quantum of education" that may enjoy the status of a "fundamental" constitutional right. Indeed, even if the Court were to recognize a broad constitutional right to public education, it is by no means clear that such a right would be so generous as to include a right to a graduate education.

Thus under the extant precedents, the only argument for applying the "exacting" tests, under the Equal Protection Clause, to the respondents' actions in the instant case is the argument that the "basis of the classification" affected by their program is inherently "suspect." We must, therefore, determine what is meant by an inherently "suspect" classification.

Given the historic purposes of the Fourteenth Amendment, the prime example of a "suspect" classification is one based upon race. *E.g., Brown v. Board of Education,* 347 U.S. 483 (1954); *McLaughlin v. Florida,* 379 U.S. 184 (1964). Other notable examples are national origin *(e.g., Oyama v. California,* 332 U.S. 633, 644-46 (1948)), alienage (*e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971)), indigency of a criminal defendant *(e.g., Griffin v. Illinois,* 351 U.S. 12 (1950)), and illegitimacy *(e.g., Gomez v. Perez,* 93 S.Ct. 872 (1973); *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972)).

Although the respondents' admissions program creates a classification that is based upon race and national origin, it does not automatically follow that the respondents' actions are subject to the "exacting" test under the Equal Protection Clause. In fact several lines of the decision by this Court make it clear that the "exacting" test is inapplicable to the respondents' classification and actions.

In no decision that has come to the attention of *amici curiae* has this Court applied the "exacting" test where suit was not brought by or on behalf of members of groups that have been subject to historic and pervasive discrimination and deprivations. Obviously, the core purpose of the Equal Protection Clause was to affect a radical change in the status of the freedman, i.e., blacks. Consequently, governmental classifications *deemed* to be disadvantageous to blacks have always been subjected to "rigid scrutiny." Extension of this constitutional protection to

other racial minorities, such as orientals, followed as a matter of course. Members of such groups were, after all, subject to precisely the same kinds of discriminations and deprivations as were blacks. See, *e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944); *Ho Ah Kow v. Nunan*, 12 Fed. Case. 252 (No. 6546) (C.D.C. Cal. 1879). Indeed, extension of the "exacting" test under the Equal Protection Clause to cases involving racial or national origin groups other than blacks turned very much on this Court's making a determination that, for example, ". . . Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment." *Keyes v. School Dist. No. 1, Denver*, 93 S.Ct. 2686, 2691 (1973). *Accord: Hernández v. Texas*, 347 U.S. 475 (1954). One of the predicates for this determination was the recognition ". . . that '[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination.'" *Keyes, supra*, 93 S.Ct. at 2692. *Accord: White v. Regester*, 93 S.Ct. 2332, 2340-41 (1973).

All other persons and groups that have heretofore received the protection of the strict scrutiny standard have also been members of such "identifiable class[es] for purposes of the Fourteenth Amendment." The members of each such class—whether it be defined by race, national origin, alienage, illegitimacy or indigency—share three notable characteristics. First its members have been subjected to historic and pervasive discrimination and deprivations. Second, especially when the classification is based upon race or lineage,

members of a suspect class share immutable characteristics that stigmatize them and set them apart from members of the majority group. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-74 (1969); Comment, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 HARV. RIGHTS-CIV. LIBS. L. REV. 307, 348-59 (1972). Finally, within society in general, but especially in the political arena, they are relatively powerless. As Professor Wechsler has observed of the *Brown* decision: ". . . it must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved." H. Wechsler, *Toward Neutral Principles of Constitutional Law* in H. Wechsler, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW, 3, 45 (1961). Thus, each of these classes is ". . . a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53, n. 4 (1938) for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

Professor Wechsler, *id.*, at 45-46, feared that ". . . this position also presents problems." In particular he was concerned that such an approach forces a forbidden inquiry into the motive of the legislature. He also suggested that the actual impact of a racially motivated practice on a minority group member is too subjective a consideration upon which to base court judgments. Several of the *amici curiae* supporting

the petitioners echo these concerns. *E.g., Brief of the Anti-Defamation League of B'Nai B'rith Amicus Curiae* at 24. These fears are unrealistic.

First, adoption of our argument by no means requires that the Court determine the motive of the legislature. See, *e.g., Palmer v. Thompson,* 403 U.S. 217 (1971). Rather, the Court must evaluate the respondents' program on the basis of its actual or likely effects and the government's purpose in operating the program. See, *e.g., Jefferson v. Hackley,* 406 U.S. 535, 546-51 (1972). Legislative purpose is not the same as actual motive or intent. Purpose may possibly be gleaned from an actual formal statement of the legislative (or executive) body; clearly it is inferrable from a program's form, operations or its effects. See, *e.g. Keyes v. School Dist. No. 1, Denver,* 93 S.Ct. 2686 (1973); *cf., Monroe v. Pape,* 365 U.S. 167 (1961).

Second, the concern shown by Professor Wechsler and the *amici curiae* in support of the petitioners, that the subjective effect of respondents' programs on minority group members may well be negative, is also unavailing. We agree that the effects with which the Court must be concerned include subjective and psychological effects. Indeed, at the heart of the issue of effects may well be what Edmond Cahn labeled as the "consumer perspective." Cahn, *Law in the Consumer Perspective,* 112 U. Pa. L. Rev. 1 (1963); E. Cahn, THE PREDICAMENT OF DEMOCRATIC MAN (1961). The consumer perspective simply means that the most valid judgment which can be given about institutions is given by those people they are intended to serve—

i.e., the "consumer" of that institution's services; in the instant case students who are members of minority groups.

It does not follow that Professor Wechsler is correct when he states that there is ". . . a point in *Plessy* '[*v. Ferguson,* 163 U.S. 537, 551 (1896)] in the statement that if 'enforced separation stamps the colored race with a badge of inferiority' it is solely because its members choose 'to put that construction upon it.'" H. Wechsler, *supra,* at 46. The perceptions of the minority group "consumers" do not originate in an act of will on their part, nor are they unrelated to the purposes and the perceptions of the majority group. See Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L. J. 421 (1960). Further, in the context of the instant case, it is perverse to suggest, based only upon scant literary statement, that affirmative action admissions programs, such as that of the respondents, actually "stigmatizes" the programs' beneficiaries. See *Brief of the Anti-Defamation League of B'nai B'rith Amicus Curiae* at 24. The facts marshaled, *supra,* under Point II of this brief, show the respondents' program is designed to remedy gross deprivations of "discrete and insular" minorities. That both the actual and subjective effect is likely to be consistent with that design, is clear. More than this a court should not require. *Cf.*, Black, *The Lawfulness of the Segregation Decisions, supra.*

Nothing in any decision of this Court suggests that a racial or national origin classification is subject to

the "rigid scrutiny" standard when its benefits are bestowed upon the members of an "identifiable class for purposes of the Fourteenth Amendment," or its deleterious effects are neither intended to nor in fact fall upon the members of such a "discrete and insular" minority. *Cf., e.g., McDaniel v. Barresi,* 402 U.S. 39 (1971). Judicial precedent and common sense indicate to the contrary.

First, this Court has itself specifically fashioned and legitimated race conscious remedies designed to eliminate or ameliorate the historic and pervasive effects of racial discrimination. See, *e.g., Swann v. Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1 (1971). In enforcing federal laws against racial and national origin discrimination in employment, half of the United States Courts of Appeals have validated or directed preferential hiring and promotion remedies. At least two Courts of Appeals have specifically validated affirmative action preferential hiring programs imposed by non-judicial bodies. *Associated General Contractors v. Altshuler,* ..... F.2d ....., 6 FEP Cases 1031 (1st Cir. Nov. 30, 1973); *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

Several of the *amici curiae* supporting the petitioners have argued that these precedents are inapposite because they "are characterized by judicial findings of specific prior discriminatory acts by the particular institution or employer involved." *Brief of the American Jewish Congress, Amicus Curiae, in Support of*

the Petitioners, p. 18. *Accord: Brief of the Anti-Defamation League of B'Nai B'rith Amicus Curiae.*[32] We know of no principle of constitutional law from which one might conclude that application of the "exacting" standard of review under the Equal Protection Clause is appropriate when a particular institution voluntarily embarks on an affirmative action program. *Cf. e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971). If the university must first prove that it discriminated a glaring anomaly results. A university adjudicated to be a discriminator could be compelled to participate in affirmative action, while an equally guilty university, seeking either to avoid litigation or to right a wrong, could not voluntarily operate an affirmative action program unless it was prepared to demonstrate or confess that it had discriminated.[33] When a non-judicial governmental agency decides to take steps to eliminate or ameliorate the effects of racism in our society, it makes no more sense to require it to demonstrate that the specific activities or institutions subject to its regulation have actually been guilty of racism than it would have been for this Court to have required that the Department of

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[32]Notably, the *Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae*, pp. 19-24, takes the position that the remedies imposed or validated in these employment cases are unlawful.

[33]That the Record in this case reflects no evidence of overt discrimination by the University of Washington School of Law by no means proves that it did not have a history of discrimination nor that the traditional academic admissions criteria are both valid and free from cultural bias. The case was, after all, defended by the University's attorneys.

Agriculture justify the second Agricultural Adjustment Act by demonstrating that one small farmer's home-consumed wheat would itself have affected the supply-demand curve for wheat. Compare *Wickard v. Filburn,* 317 U.S. 111 (1942).

This Court has specifically ruled that "§ 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). When Congress exercises that power, or the similar powers granted to it under the Thirteenth[34] and Fifteenth Amendments,[35] this Court has instructed that judicial review is severely limited to a determination of whether the legislation is appropriate ". . . to enforce the Equal Protection Clause, that is, under the M'Culloch v. Maryland [17 U.S. 4, Wheat 316, 421 (1819)] standard, whether . . . [the statute] may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end' and whether it is not prohibited by but is consistent with 'letter and spirit of the Constitution.'" 384 U.S. at 651.

In applying this standard of review, the Court sustained the constitutionality of § 4(e) of the Voting Rights Act of 1965, which in effect singles out Puerto

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[34] *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 443-44 (1968).
[35] *South Carolina v. Katzenbach,* 383 U.S. 301, 326 (1966).

Ricans as a class and ". . . provides that no person who has successfully completed the sixth primary grade in public school in, or a private school accredited by, the Commonwealth of Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English." 384 U.S. at 643. If petitioners' view of the Equal Protection Clause is accepted by this Court, it may well be called upon to decide, in a new lawsuit brought by Anglos, whether, by diluting the vote of non-Puerto Ricans in New York, Congress' enfranchisement of Puerto Ricans not literate in English can survive "exacting" review under the Equal Protection Clause.

Similarly, the purpose and effect of the federal government's requirement that the public schools of the states provide bilingual instruction to children who are not literate in English grants an advantage to members of "identifiable groups for purposes of the Fourteenth Amendment," *i.e.*, aliens and members of certain national origin groups. This requirement has been validated by the Court in *Lau v. Nichols*, ... U.S. ....., 42 U.S. L. WEEK 4165 (No. 72-6520, Jan. 21, 1974). If the Court were to adopt petitioners' view of the Equal Protection Clause, it might well have to decide whether Anglo children who are literate in English are entitled to a judicial reevaluation of the federal requirement under the "strict scrutiny" standard, on the ground that re-allocation of educational resources to bilingual programs has denied

them equal educational opportunity.[36] Quite similar arguments were made by white parents and school children in their vain efforts to circumvent this Court's decision in *Brown*. See *e.g., McDaniel v. Barresi,* 402 U.S. 39 (1971). Adoption of the petitioners' view of the Equal Protection Clause would now give credit to such arguments; for this Court has ruled that "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. . . . ." *Katzenbach v. Morgan,* 384 U.S. at 651 n. 10 (1966). Notably, in *Lau, supra,* this Court implicitly validated VI of the Civil Rights Act of 1964, on the basis of which the Department of Health, Education and Welfare has promulgated regulations requiring universities to operate affirmative action programs like that of the respondents, 45 C.F.R. Part 80, § 80.3(b)(6).

We submit that in passing upon the validity of governmental programs that have both the purpose and the effect of providing an advantage to members of "identifiable class[es] for purposes of the Fourteenth Amendment," the courts are obligated to apply only the traditional test under the Equal Protection Clause. They must determine only whether "the benign classifications described are at least rationally related to achieving that purpose." Comment, *Devel-*

[36]Equally "suspect" would be myriad other federal and state programs designed and operated to redress the effects of racism, for example, the federal government's programs for special loans and services to minority business enterprises.

opments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1107 (1969). For this Court's latest application of the traditional standard, see, *Marshall v. United States*, 42 U.S.L.W. 4121 (U.S. No. 72-5881, Jan. 9, 1974).

If the test to be applied is the traditional equal protection test of demonstrating that the given classification bears a reasonable relationship to a legitimate governmental interest, an affirmative action minority group admission and training program, such as the one operated by the University of Washington School of Law, is clearly constitutional. Both the purpose and the effect of the program is to benefit members of minority groups that have been subject to historic and pervasive discrimination and deprivations. The program follows a reasonable design and its operation is related to fulfillment of that legitimate governmental purpose. Hence the program is constitutional, even though its operation may exclude non-minority group persons from a government benefit apparently on the ground of race or national origin.

Even if the more "exacting" test of equal protection is applied, the purpose, design and effect of the respondents' program overcomes "the inherently suspect" quality of the racial classification. In this respect, the decision of the court below was clearly correct. It is too late in the day to suggest otherwise. See, *e.g.*, Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV., *supra*, at 1087-91; Hughes, *Reparations for Blacks?*, 43 N.Y.U.L. REV.

1063, 1071-73 (1968). See Points I and II of this brief, *supra,* for our arguments, and their factual underpinnings, on this issue.

The United States Court of Appeals for the Second Circuit has articulated the proper interpretation of Justice Harlan's "color blind" *dictum.* In an opinion by Judge Smith, that Court declared that government urban renewal agencies are under a special obligation to provide adequate replacement housing for minority group members displaced by renewal projects. Judge Smith specifically observed:

> What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 931-32 (2d Cir. 1968).

CONCLUSION

For the reasons stated in this brief, as well as reasons stated in the other briefs in support of the respondents, we submit that the decision of the court below should be ~~reversed~~ affirmed.

Dated, February, 1974.

Respectfully submitted,

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(Appendices Follow)

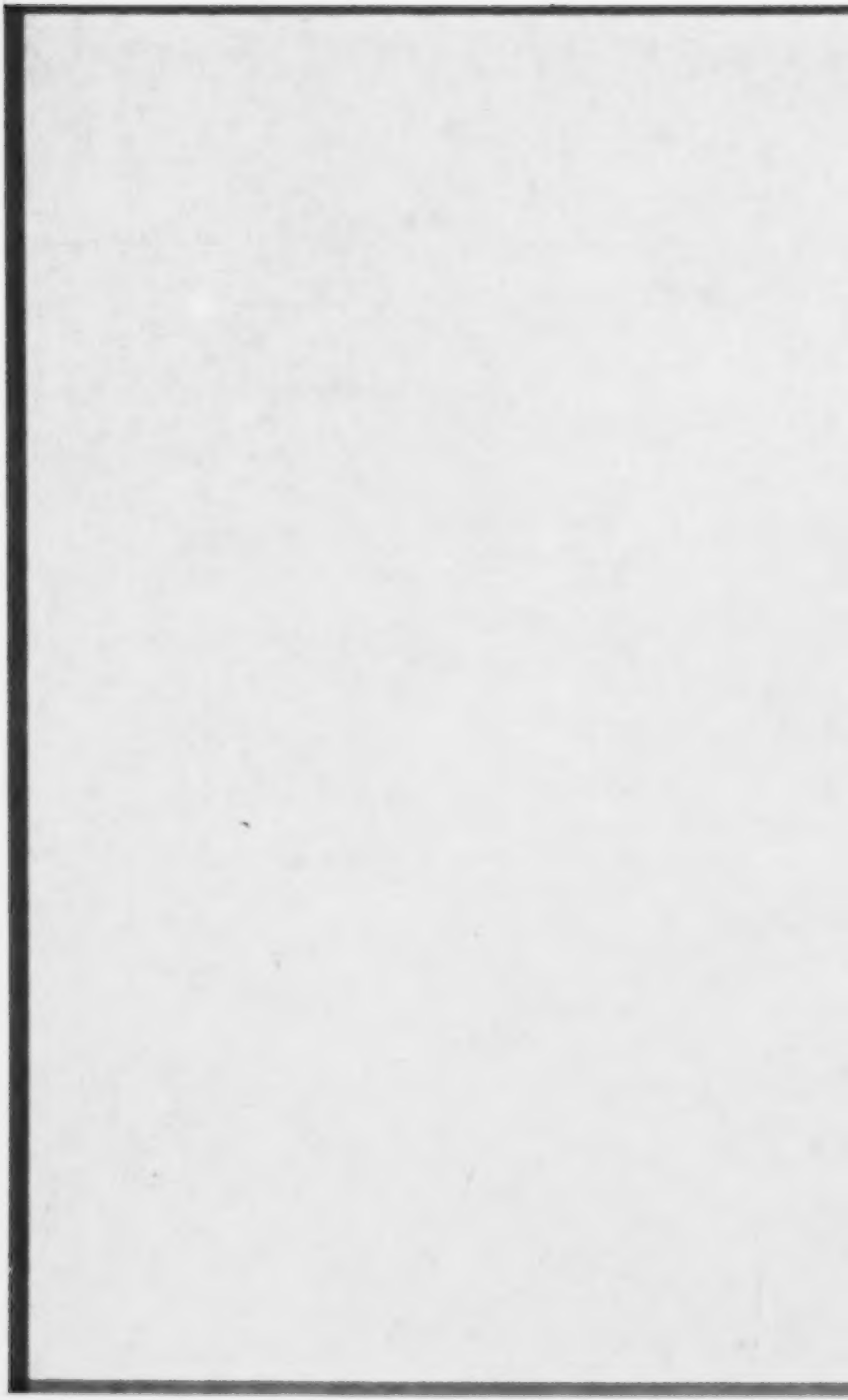
Appendix A

1973 SURVEY OF MINORITY GROUP STUDENTS IN LEGAL EDUCATION

Amended Copy--12/19/73

TABLE 1. MINORITY STUDENTS ENROLLED IN APPROVED LAW SCHOOLS

		1st year	2nd year	3rd year	4th year	Year Not Stated	TOTAL
BLACK AMERICAN	1973-74	1,943	1,443	1,207	101	123	4,817
	1972-73	1,907	1,324	1,106	74	12	4,423
	1971-72	1,716	1,147	761	55	65	3,744
	1969-70	1,115	574	395	44	--	2,128
CHICANO (MEXICAN-AMERICAN)	1973-74	539	386	271	63	0	1,259
	1972-73	480	337	238	17	0	1,072
	1971-72	403	262	170	11	37	883
	1969-70	245	113	54	0	--	412
PUERTO RICAN	1973-74	96	47	32	5	0	180
	1972-73	73	40	25	5	0	143
	1971-72	49	25	18	2	0	94
	1969-70	29	14	13	5	--	61
OTHER HISPANO AMERICAN	1973-74	94	70	59	4	34	261
	1972-73	96	72	60	3	0	231
	1971-72	74	62	35	3	5	179
	1969-70	35	18	19	3	--	75
AMERICAN INDIAN	1973-74	109	65	44	3	1	222
	1972-73	79	48	44	2	0	173
	1971-72	71	46	18	2	3	140
	1969-70	44	17	10	1	--	72
ASIAN AMERICAN	1973-74	327	~~296~~ 297	202	19	5	~~849~~ 850
	1972-73	298	218	144	20	1	681
	1971-72	254	142	72	7	5	480
OTHER	1969-70	84	55	42	4	--	185
GROUP NOT STATED	1973-74	6	~~6~~ 5	1	0	0	~~13~~ 12
	1972-73	1	2	2	2	0	7
	1971-72	0	23	25	0	0	48
TOTAL MINORITY GROUP STUDENTS	1973-74	3,114	2,313	1,816	195	163	7,601
	1972-73	2,934	2,041	1,619	123	13	6,730
	1971-72	2,567	1,707	1,099	80	115	5,568
	1969-70	1,552	791	533	57	--	2,933



Appendix B

LEGAL EDUCATION AND BAR ADMISSION STATISTICS

1963-1973

Year	Total	Enrollment Women	First Year	LSAT Candidates	J.D. or LL.B. Awarded	New Admissions to the Bar
1963	49,552	1,383	20,776	30,528	9,638	10,738
1964	54,265	2,183	22,753	37,598	10,191	12,023
1965	59,744	2,537	24,167	39,406	11,507	13,109
1966	62,556	2,678	24,077	44,905	13,113	14,614
1967	64,406	2,906	24,267	47,110	14,738	16,007
1968	62,779	3,704	23,652	49,756	16,977	17,764
1969	68,386	4,715	29,128	59,050	16,733	19,123
1970	82,499	7,031	34,713	74,092	17,183	17,922
1971	94,468	8,914	36,171	107,479	17,006	20,485
1972	101,707	12,173	35,131	119,694	22,342	25,086
1973	106,102	16,760	37,018	121,262	27,756	

NOTES: Enrollment is that in American Bar Association approved school as of October 1. The LSAT candidate volume is given for the test year ending in the year stated. Thus, 121,262 administrations of the LSAT occurred in the test year July, 1972, through April, 1973. J.D. or LL.B. degrees are those awarded by approved schools for the academic year ending in the year stated. Thus, 27,756 degrees were awarded in the year beginning with the fall, 1972 term and ending with the summer, 1973 term. Total new admissions to the Bar are for the 1972 calendar year and include those admitted by office study, diploma privilege, and examination and study at an unapproved law school; the great bulk of those admitted were graduated from approved schools.

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No. 73-235

In the Supreme Court of the United States

OCTOBER TERM, 1973

MARCO DEFUNIS, ET AL., PETITIONERS

v.

CHARLES ODEGAARD, ET AL., RESPONDENTS

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO THE DEPARTMENT OF JUSTICE

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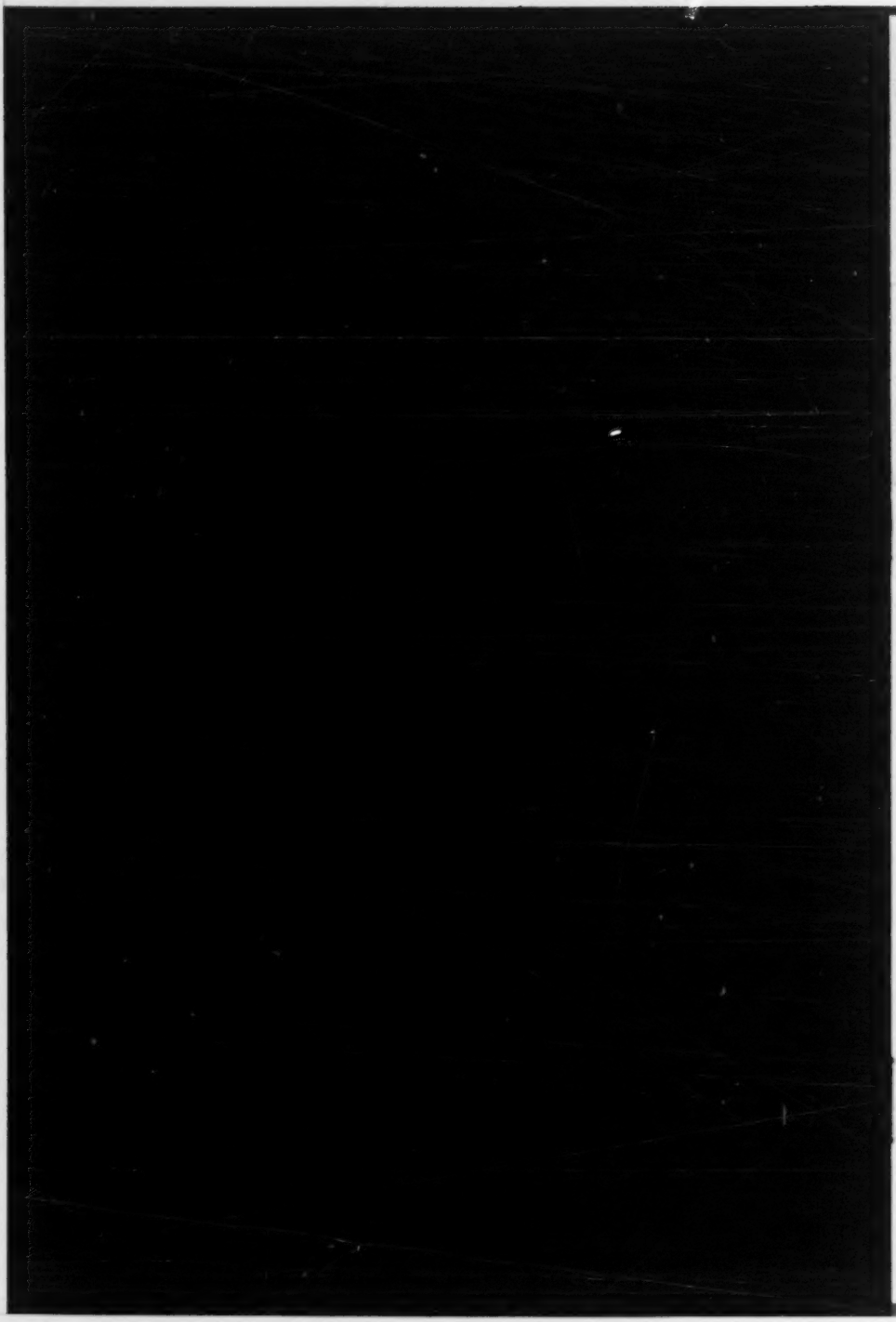

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-295

MARCO DEFUNIS, ET AL., PETITIONERS

v.

CHARLES ODEGAARD, ET AL., RESPONDENTS

MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO THE DEPARTMENT OF JUSTICE

This is in response to the letter from the Solicitor General suggesting that the motion of the Equal Employment Opportunity Commission for leave to file a brief *amicus curiae* and the brief attached thereto not be received by the Court since not authorized by the Solicitor General or the Attorney General. The suggestion, we submit, overlooks the fact that the Equal Employment Opportunity Commission is not claiming that it has a right to file a brief as of right, but is asking the permission of the Court to do so. It does not purport to represent the view of the United States or any other government agency, but merely to present to the Court its concern as to the possible effects of a decision in this case on the mat-

532-222—74——1

ters which have been specifically entrusted by Congress to its expertise as an independent agency.

For these reasons, we do not believe that the statutes cited by the Solicitor General are applicable in this situation. We of course recognize that, where the Equal Employment Opportunity Commission is a party, Congress has provided that it shall be represented in the Supreme Court by the Attorney General. Section 705(b)(2) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. (Supp. II), 2000e–4(b). But the Commission is not a party to the instant litigation and is not seeking to present its views as such. Similarly, neither 28 U.S.C. 516 nor 28 U.S.C. 518 is applicable since the Commission is in no sense seeking to enter the proceeding as a litigant or as an agency which can as of right make its views known to the Court.

What we do suggest is that the Commission is an independent agency whose Commissioners and General Counsel are appointed for a fixed term to carry out specific duties entrusted by Congress. As such it is to a considerable degree independent of executive control, *Humphrey's Executor* v. *United States,* 295 U.S. 602, and has the ancillary powers which are appropriate to the exercise of its statutory duties even if not explicitly conferred by the statute. See *Federal Trade Commission* v. *dean Foods Co.,* 384 U.S. 597, 607. Its independent character, we submit, gives it the same right as any other independent organization to ask the Court to consider its views as to the potential

effect of a pending case on the matters specifically entrusted to its jurisdiction and to present to the Court its view of the applicable law. As an *amicus,* the Commission has no control over the litigation but, as set forth in the Statement of Interest, a decision in this case may affect its ability to carry on the duties entrusted to it by Congress. It seeks only to call these considerations to the Court's attention.

CONCLUSION

The motion is therefore appropriately before this Court for consideration.

Respectfully submitted,

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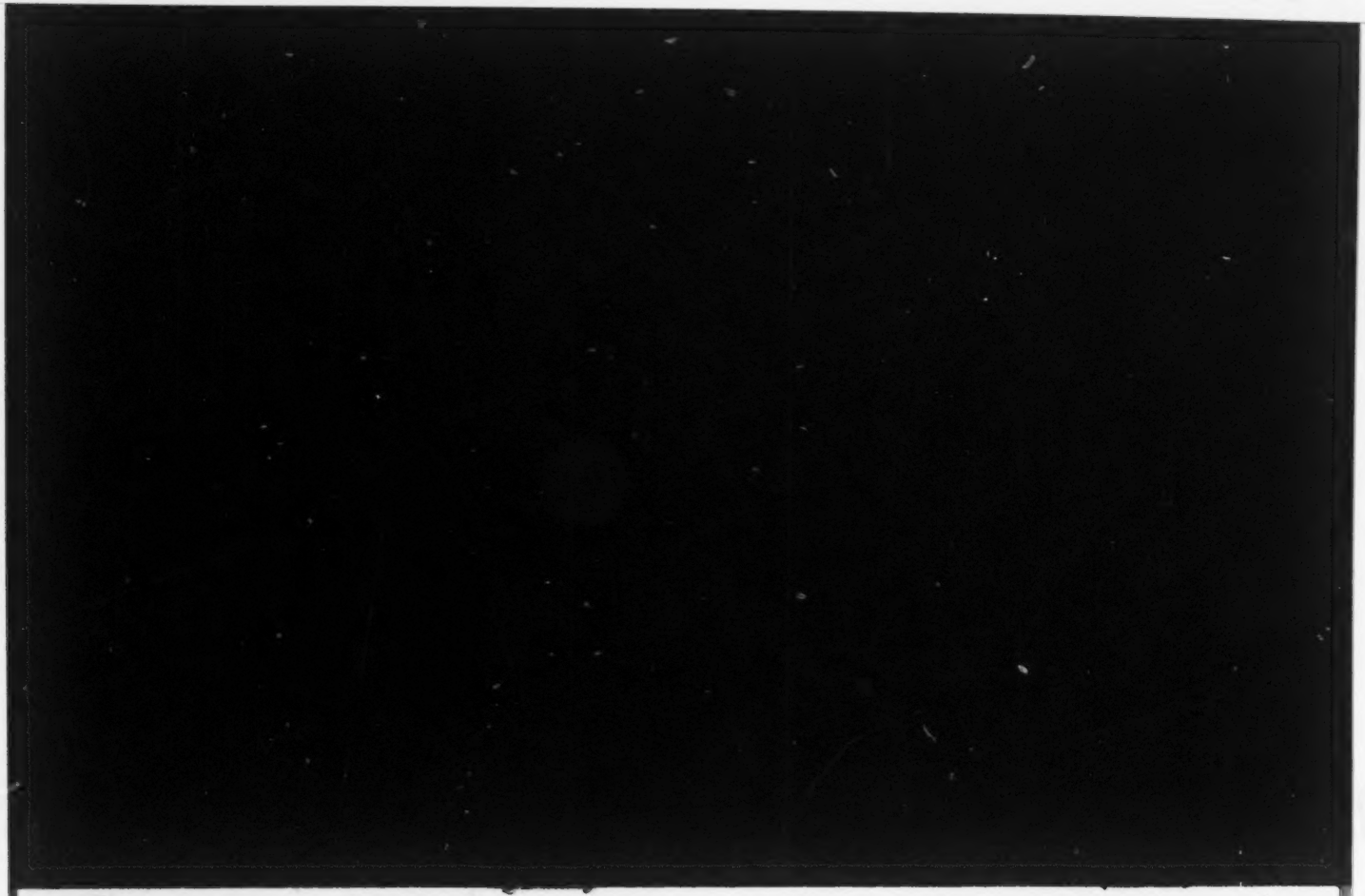
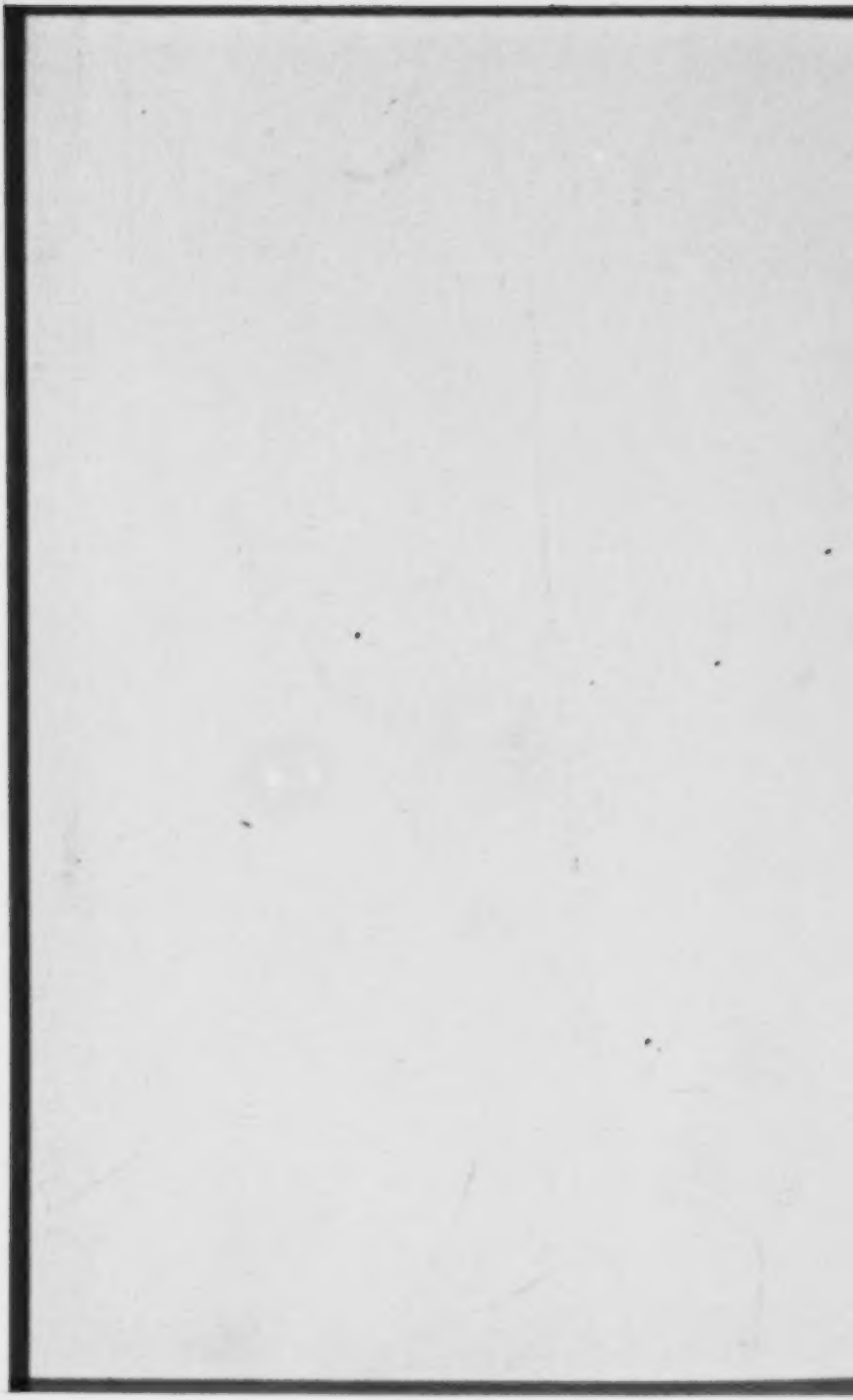
U.S. GOVERNMENT PRINTING OFFICE: 1974





SUPREME COURT, U. S.
FEB 15 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS AND BETTY DEFUNIS, HIS WIFE; MARCO DEFUNIS, JR., AND LUCIA DEFUNIS, HIS WIFE, *Petitioners,*

VS.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON; RICHARD L. RODDIS, DEAN OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; RICHARD KUMMERT, ROBERT T. HUNT AND RICHARD L. RODDIS, ADMISSIONS COMMITTEE OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP AND GEORGE B. POWELL, REGENTS OF THE UNIVERSITY OF WASHINGTON; AND HAROLD GARDINER, REGISTRAR OF THE UNIVERSITY OF WASHINGTON, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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vs.

CHARLES ODEGAARD, PRESIDENT OF THE UNIVERSITY OF WASHINGTON; RICHARD L. RODDIS, DEAN OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; RICHARD KUMMERT, ROBERT T. HUNT AND RICHARD L. RODDIS, ADMISSIONS COMMITTEE OF THE UNIVERSITY OF WASHINGTON LAW SCHOOL; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JAMES G. NEWPERT, ROBERT F. PHILIP AND GEORGE B. POWELL, REGENTS OF THE UNIVERSITY OF WASHINGTON; AND HAROLD GARDINER, REGISTRAR OF THE UNIVERSITY OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Manufacturers of the United States of America (NAM) respectfully moves for leave to file the attached brief *amicus curiae*. In support thereof the NAM states:

1. The NAM is a nonprofit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial proportion of the nation's industrial employment. A substantial number of its members are subject to the requirements of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000 *et seq.*, and Executive Order 11246, 30 C. F. R. 12319, as amended, regulating equal employment opportunity for private employers. The principles promulgated by this Court in the instant case will necessarily affect the rights and obligations of all such NAM members. See the motion of the Equal Employment Opportunity Commission for leave to file a memorandum *amicus curiae*, pp. 1-2; the briefs *amicus curiae* of the NAACP Legal Defense and Educational Fund, Inc., p. 3, and the AFL-CIO, pp. 1-12; and the proposed brief *amicus curiae* of The Chamber of Commerce of the United States of America, pp. 2-3 and n. 2.

2. The subject matter of the instant case—whether, consistent with the Constitution, state-supported educational institutions may give preference to minority applicants—is a matter of significant concern to employers. The decision in the instant case will necessarily influence both the power of the judiciary to order an employer to affirmatively grant similar preferences to remedy past general employment discrimination as well as the right of employers to voluntarily grant such special considerations. It is more than mere happenstance that the court below, in reaching its decision, relied on the opinions of lower federal courts in the employment area, i.e., *Porcelli* v. *Titus*, 431 F. 2d 1254 (3rd Cir. 1970), *cert. den.* 402 U. S. 944 (1971); *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), *cert. den.* 406 U. S. 950 (1972); and *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), *cert. den.* 404 U. S. 854 (1971). 507 P. 2d at 1181. The interest of the NAM, accordingly, in seeking to

present its views, is predicated upon the substantial and far-reaching consequences that the result of this case will have for American industry.

3. The NAM determined to submit the instant motion when, upon reviewing the briefs of other *amici*, it ascertained that no business representatives had expounded the particular arguments which the NAM desired to present. Since the NAM's views are representative of those held by a substantial segment of industry, the NAM is desirous that they be before the Court. The acceptance of the NAM's proposed arguments, moreover, will not result in any delay in the decision of this case, nor prejudice to any of the parties hereto, since these arguments are not inconsistent with the contentions that have already been made by the Petitioner and supporting *amici*. The NAM's proposed brief will be short and relevant so that the Court's time will not be misspent.

The NAM urges, therefore, that leave be granted to file the accompanying brief as *amicus curiae* and respectfully so moves this Court.

Respectfully submitted,

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the National Association of Manufacturers of the United States of America (NAM) in this case is set forth in the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

1. The crux of this case is whether benign racial classifications, or reverse discrimination, is constitutionally permissible. The NAM submits that the controlling equal protection test—that racial classifications are permissible only where there is an "overriding statutory purpose" and "compelling [state] interest" (see, e.g., *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964))—has not been met here.

The University of Washington Law School is necessarily required, in determining its entering class, to select only a limited number from many potentially qualified individuals. Employers, in their day-to-day employment decisions, must also choose among many potentially eligible employees. The crucial consideration, as a result, is the standard to be utilized for the selection process. An answer, at least in part, was provided by *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). There, this Court declared that the law was not intended "to guarantee a job to every person . . . [there is no] command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." Rather, what is forbidden is the "discriminatory preference for any group, *minority or majority* . . . Congress has made [job] qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant." *Id.* at 430-431, 436 (emphasis added). This principle was recently reiterated in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 801 (1973), where this Court again stressed that the objective is "fair and racially neutral employment . . . decisions."

This case, with its necessary chain-reaction in the employment field, will materially determine whether, in enunciating a principle of racial neutrality in *Griggs* and *McDonnell Douglas*, this Court meant what it said. If there is here an "overriding statutory purpose" and "compelling [state] interest", sufficient to meet the constitutional equal protection test,[1] then employers, either by court or agency compulsion or through their own voluntary efforts, will similarly be able to establish racial, religious or sex preferences. The criteria for employment decisions will no longer be merit, neutrality and the qualifications of the job. It is immaterial that the purpose of this proposed new standard is benign rather than invidious. Even legitimate ends are subject to equal protection limitations (see *Oyama* v. *California*, 332 U. S. 633, 646-647 (1948)) and must take into account the "proper weight [to be] given the other values in our society."[2] Employment rights may, of course, be granted to particular persons where there is a specific finding that they have *individually* suffered from past discrimination. In such a case, there is no deprivation on anyone. No one has been granted a "preference" or deprived of any rights. Where, however, special treatment is granted to a class of unidentified persons, predicated solely on a claim of past *general* racial discrimination, it is subject to the same constitutional infirmity as would be granting such a preference to a white. "Equal protection of the law", as this Court has recognized, "is not achieved

1. Veterans' preferences, or other preferences which are not based on race, are exempt from the same "rigid scrutiny" and constitutional suspicion. See *McLaughlin* v. *Florida*, 379 U. S. 184, 191, 192 (1964). They are, therefore, of a different order and must be evaluated by a different constitutional standard. See Note, *Constitutionality of Remedial Minority Preferences in Employment*, 56 Minn. L. Rev. 842, 846 n. 23 (1972).

2. Kaplan, *Equal Justice In An Unequal World: Equality For the Negro—The Problem Of Special Treatment*, 61 Nw. U. L. Rev. 363, 382 (1966); Comment, *Carter* v. *Gallagher: From Benign Classification to Reverse Discrimination*, 34 U. Pitt. L. Rev. 130, 139 (1972). See also the authorities discussed in the *amicus* brief of the B'nai B'rith Anti-Defamation League, pp. 23-24.

through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948).

2. Remedial measures which provide for reverse discrimination to cure past general discrimination, whether embodied in a court order[3] or resulting from administrative coercion,[4] are simply another form of race discrimination. A benign quota is still a quota; it still constitutes, as the B'nai B'rith Anti-Defamation League observed in its *amicus* brief (p. 17), "a device for establishing a status, a caste, determining superiority or inferiority for a class measured by race without regard to individual merit." A racial classification, even if instituted for a laudatory objective, is still denigrating and stigmatizing. It still raises serious questions of counter-productiveness and deleterious consequences which may diminish overall the total job opportunities available to minority employees as well as interject devisive consequences in the employment area.[5] And it still establishes principles that have previously been considered an anathema: that the key to employment is not individual merit

3. See, e.g., *Carter* v. *Gallagher*, 452 F. 2d 327 (8th Cir. 1971) (*en banc*), *cert. den.* 406 U. S. 950 (1972).

4. See, e.g., 41 C. F. R. § 60-2.2; and *Contractors Assn. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), *cert. den.* 404 U. S. 854 (1971). It matters little, it is submitted, whether a racial preference is labelled a "quota" or a "goal" or a "timetable" as long as there is an erosion of the merit basis for an employment decision. If failure to meet a numerical commitment constitutes at least *some* level of evidence of unlawful discrimination (see, e.g., the Department of Justice's *Memorandum on Permissible Goals and Timetables*, pp. 3-5), then there has been improper government discrimination. See *Developments In The Law—Employment Discrimination And Title VII Of The Civil Rights Act Of 1964*, 84 Harv. L. Rev. 1109, 1301-1303 (1971). By the same token, the alleged accommodation (452 F. 2d at 330-31) reached by the Eighth Circuit's *en banc* decision in *Carter*—adopting a formula approach while rejecting any absolute preference—similarly is open to constitutional objection. Cf. Note, 56 Minn. L. Rev., *supra* n. 1 at 854-57.

5. See, e.g., *Vulcan Society* v. *Civil Service Commission*, 360 F. Supp. 1265, 1277-78 (S. D. N. Y. 1973), *aff'd.*, ... F. 2d ...., 6 FEP Cases 1045 (2nd Cir. 1973); and Kaplan *supra*, n. 2 at 370-384.

alone; that race is a relevant consideration in the employment field; and that the government can constitutionally employ racially discriminatory preferences or, preusmably, similar preferences in other areas where the law was previously considered color-blind. See, e.g., the dissent below at 507 P. 2d 1189. Preferential treatment of one group "necessarily results in 'discrimination' against another; the two patterns of behavior are simply obverse sides of the same coin." *Developments In The Law—Employment Discrimination And Title VII of The Civil Rights Act Of 1964*, 84 Harv. L. Rev. 1109, 1300 (1971). Such discrimination is diametrically at odds with the principles of neutrality enunciated in *Griggs* and *McDonnel Douglas, supra,* where unrelated to specific findings of individual past discrimination.

A court or agency should, of course, adopt all available constitutional measures to eradicate any vestiges of past general discrimination. Remedial provisions to inform the minority community that employment will thereafter be available on a non-discriminatory basis, to establish an active recruitment and promotional program aimed at minorities or to eliminate any employment qualifications which are not reasonably related to job performance or otherwise discriminate against minorities should all be utilized wherever needed. What is and should be forbidden is where the state seeks not only to equalize *availability* of employment opportunities but, instead, actually discriminates against non-minorities by granting a preferred employment status on the basis of a constitutionally impermissible classification.

3. Voluntary private racial preferences, while perhaps reducing the devisiveness and other adverse consequences of state-imposed preferences, are nevertheless similarly premised on the "overt acknowledgement that preference for Negroes is not to be treated the same way as preference for non-Negroes . . . [T]here would be a difference in the position of the government with respect to the non-Negro worker—but it is the difference between hitting someone and holding him while some-

one else does the hitting." Kaplan, *supra* n. 2, at 385. Since such private preferences would require an exception to the anti-discrimination and anti-preference requirements of state and federal equal employment laws, and in particular the provisions of Sections 703(a) and (j) of Title VII, they would be unconstitutional. The situation would, in effect, be no different than a case where an employer voluntarily chose to discharge white employees in order to create employment opportunities for Black applicants. In both instances, since the employment decision was premised upon racial considerations, it is violative of both anti-discrimination laws and the Constitution.

4. The crucial issue presented by this case is whether the prevailing view of our society that a person should be selected on the basis of ability and merit is still operative. May a state act on the premise that, regardless of merit, a person is to be entitled to special treatment because of his race *and for no other reason?* The thesis of this brief has been that, both with respect to state-supported educational institutions and in the employment area, the Constitution requires neutrality as to race regardless of any good faith intent. Whether the object is benign or invidious, and regardless of the particular race that may be benefited or disadvantaged, selecting persons on the basis of their race, rather than their individual merit, causes irreparable damage. Surely, if *some* special treatment is to be deemed constitutionally permissible, there is no reason to believe that it will stop at the level of law school admissions. It could be argued with equal force that educational grading systems, bar admissions or a host of other public and private selection measures should also have two tiers. Preferences can also be urged to rectify an almost endless array of alleged victims of past general discrimination. None of these past asserted wrongs, however, can justify present deprivations of equal protection guarantees. The test, to repeat, must be racial neutrality.

CONCLUSION

For all the foregoing reasons, in addition to those presented by the Petitioner and supporting *amici*, the decision below should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

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October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

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vs.

CHARLES ODEGAARD, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND ANNEXED BRIEF, OF COMMITTEE ON ACADEMIC NONDISCRMINATION AND INTEGRITY

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IN THE

Supreme Court of the United States

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Petitioners,

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CHARLES ODEGAARD, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY

The undersigned, as counsel for the above-named organization, respectfully move this Court for leave to file the accompanying brief *Amicus Curiae.*

The Committee on Academic Nondiscrimination and Integrity is a national association of university, graduate school, and professional school professors and administrators who have joined together to further equality of opportunity in university employment and admissions. They firmly believe that all persons must be equal before the law, and in the selection procedures of colleges, universities, and

other institutions of higher learning with respect to employment and admission of students. The Committee is also concerned with protecting academic standards against degradation from any source that would lower the quality of American intellectual life.

The Committee believes that the outcome of this case will directly and substantially advance or retard efforts to make sure that invidious discrimination is eliminated from American higher education. On the basis of its experience in combatting such discrimination, it seeks to submit to this Court the reasons why it believes that the judgment below should be reversed.

The annexed brief notes that the discrimination caused by the unconstitutional perversion of the affirmative action concept in student admissions is depriving many Americans of their right to equal protection of the law. It argues that past discrimination against one group cannot be redressed by present discrimination against others.

Because of the rapidly approaching date for oral argument in this case, we have not sought the consent of the parties to the filing of a brief *Amicus Curiae*. We ask that the Court accept the delayed filing of this brief, in the interests of justice.

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February, 1974

IN THE

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October Term, 1973

No. 73-235

MARCO DE FUNIS, *et al.*,

Petitioners,

vs.

CHARLES ODEGAARD, *et al.*,

Respondents.

BRIEF OF THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY *AMICUS CURIAE*

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BRIEF OF THE COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY *AMICUS CURIAE*

Opinions Below

The opinions of the Supreme Court of Washington are reported at 82 Wn. 2d 11, 507 P. 2d 1169, and are reprinted as Appendix A to the Petitioner's Jurisdictional Statement or in the Alternative Petition for Certiorari.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3). Certiorari was granted on 19 November 1973.

Questions Presented

The questions presented in this case are two:

1. May a state establish racial quotas for the admission of students to its law school?

2. May a state, which cannot constitutionally discriminate on racial grounds against black applicants to its law school, constitutionally discriminate on racial grounds against white applicants to its law school?

Constitutional Provision

The Fourteenth Amendment to the Constitution of the United States provides:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Interest of the *Amicus Curiae*

The Committee on Academic Nondiscrimination and Integrity (CANI) is a nationwide group formed in early 1972 by faculty members from American colleges and universities, both state and private. They were alarmed by the development of certain administrative and other practices related to university admissions and employment which they felt were in direct opposition to the letter and spirit of the 1964 Civil Rights Act and to the equal protection provisions of the United States Constitution. CANI is an

offshoot from the University Centers for Rational Alternatives, an organization of concerned scholars and teachers which from its inception in 1968 worked through its members and chapters towards the reestablishment of tranquility on American campuses, the strengthening of rational discourse as the best method of education, and in support of academic freedom which was then under attack by partisans of intolerant political orthodoxies.

During its comparatively brief existence, the Committee on Academic Nondiscrimination and Integrity has succeeded in uniting a representative cross-section of faculty members from colleges and universities all across the country. It brought together professionals from every discipline, women and men, blacks and whites, Jews and Gentiles, renowned academics with many years of tenure and young graduates entering academic life. This fundamental diversity is well reflected in the composition of CANI's Steering Subcommittee, which consists of:

Arthur Bestor, University of Washington
Bruno Bettelheim, University of Chicago
Joseph Bishop, Yale Law School
Daniel Boorstin, Smithsonian Institution
R. C. Buck, University of Wisconsin
Robert F. Byrnes, Indiana University
Nicholas Capaldi, CUNY, Queens
Paula Sutter Fichtner, Brooklyn College
Nathan Glazer, Harvard University
Oscar Handlin, Harvard University
George Hildebrand, Cornell University
Gertrude Himmelfarb, CUNY, Brooklyn
Jack Hirschleifer, UCLA
Sidney Hook, Hoover Institution
Erich Isaac, CUNY, CCNY

Rael J. Isaac, CUNY, Brooklyn
Paul Kurtz, SUNY, Buffalo
Abba Lerner, CUNY, Queens
Daniel Lerner, MIT
Seymour M. Lipset, Harvard University
Fritz Machlup, Princeton University
Ernest Nagel, Columbia University
Norma L. Newmark, CUNY, Lehman College
Eugene Rostow, Yale Law School
Paul Seabury, University of California, Berkeley
John Searle, University of California, Berkeley
Malcolm Sherman, SUNY, Albany
Philip Siegelman, San Francisco S. U.
Thomas Sowell, UCLA
Abraham Tauber, Yeshiva University
Miro M. Todorovich, CUNY, Bronx Community College
L. Pearce Williams, Cornell University
Jacob Wolfowitz, University of Illinois
Cyril Zebot, Georgetown University

Through its extended academic network of members and friends, CANI first gathered information on cases involving so-called reverse discrimination against qualified applicants for academic positions and university admissions. Many of these cases then served as the basis for complaints by other allied civic and civil rights organizations. The accumulated evidence served subsequently for the analysis of trends and the formulation of positions which CANI advanced during its presentations to the Secretary of Labor, the officials of the Labor Department's Office of Federal Contract Compliance, the Secretary of the Department of Health, Education, and Welfare, the Office for Civil Rights of the Department of Health, Education, and Welfare, and the officials of the Executive Office

of the President. Representations were also made at several regional offices of the Office for Civil Rights and local university administrations. Factual materials have also been put at the disposal of interested members of Congress. The Committee is helping members of the academic community who are seeking redress against discrimination.

During its inquiries and studies, the Committee on Academic Nondiscrimination and Integrity has repeatedly encountered the rapidly spreading practice of administrative imposition of overt or covert racial quotas in both admissions and the hiring and promotion of instructors at institutions of higher education. In case upon case, despite the claim of benign intent and allegiance to principles of nondiscrimination, persons whose achievements led them to believe that they would be given the opportunity to acquire further skill or knowledge or to use their scholarly abilities, found themselves discriminated against for no other reason than their race or sex.

The question of the constitutionality of the establishment of racial quotas for admission to institutions of higher education is of vital importance to members of the Committee, not only because the decision will affect the quality of the students they teach, and thus also the quality of future scholars, but because it bears directly and obviously on the constitutionality of the establishment of racial quotas in the hiring and promotion of instructors in such institutions.

Statement

The statement of the facts of the case in the brief *Amicus Curiae* of the Anti-Defamation League of B'nai B'rith is correct and satisfactory and we hereby adopt it.

Summary of Argument

The decision of the Supreme Court of Washington, holding constitutional the use of racial quotas to determine eligibility for admission to the Law School of the University of Washington, is inconsistent with the general doctrine that state action which discriminates on the basis of race is presumptively a denial of the equal protection of the laws and with the specific holding of this Court that the exclusion of an applicant for admission to a state university solely on the basis of race is a violation of the Fourteenth Amendment. The record shows no "compelling state interests" that justify resort to a method of compensation for educational disadvantages which is so drastic and so inherently objectionable.

Argument

This Court has squarely held that the exclusion of an applicant from a state university solely on the basis of race violates the Fourteenth Amendment. *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *cf. Brown* v. *Board of Education*, 347 U.S. 483 (1954). To argue that De Funis was not excluded from the University of Washington Law School because of race is sophistry. It is undisputed that he would have been admitted if all applicants for admission had been scrutinized according to the same criteria, or if he had been a member of one of the racial groups for whom admission quotas had been established. The Court's holding in *Sweatt* v. *Painter, supra*, is in essence an application of the broader principle that the imposition of a racial

classification by an agency of the state is presumptively invalid under the Fourteenth Amendment. *Loving* v. *Virginia*, 388 U.S. 1, 10 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184, 191-92 (1964).

"Distinctions between citizens solely by reason of their ancestry are by their very nature odious." *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943). There may perhaps be very extraordinary circumstances, as that case rather unhappily demonstrates, in which discrimination on the basis of race might be constitutionally permissible. See Rostow, "The Japanese-American Cases—a Disaster," 54 *Yale Law Journal* 489, 1945. In any event, whatever authority that decision had, even for times of war, was qualified if not repudiated, by *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). Manifestly, if it is unconstitutional to try civilians before military courts in times of war when the civil courts are open, it would seem *a fortiori* unconstitutional to imprison civilians and to restrict their freedom to travel or to live where they choose, without even a miliary trial on the basis of Presidential action pursuant to a statute. It would be difficult to imagine a clearer case of attainder. *United States* v. *Brown*, 381 U.S. 437 (1965). The interference with normal civil rights in *Duncan* is far less drastic than state action based on race.

The desire, however well-intentioned, to benefit one race at the expense of another is not the kind of circumstance which could make the reasoning of *Hirabayashi* applicable. The mechanical admission or exclusion of students (or faculty) purely on the basis of race can benefit neither education nor scholarship. It is more than doubtful that it benefits those for whose supposed advantage racial quotas

are established. See *e.g.*, *Sowell*, BLACK EDUCATION, MYTHS AND TRAGEDIES, 202 (1972). The cure for poison is not an injection of more poison.

There are many methods, short of the "inherently odious" practice of admitting or excluding applicants by reason of their ancestry, of compensating those who have been deprived of educational opportunity. The Committee on Academic Nondiscrimination and Integrity favors maximum efforts by the state to assure all potentially qualified members of all races an opportunity to acquire legal and other education. It favors special efforts to prepare the disadvantaged for fair competition, so that they can fully participate in every activity of our society on the basis of equal opportunity. It favors an increase in the total number of places in institutions of higher learning. It favors the use of flexible policies, which may consider such individual qualities as social or ethnic background as *one* factor in the selection of applicants. Of course, such policies must be implemented on a nondiscriminatory basis since race or ethnicity are not evidence of economic, social or cultural deprivation. But, by the same token, the Committee cannot support admission or exclusion on the basis of arbitrary racial quotas, such as were employed by the Law School of the University of Washington.

Under the Respondents' theory of this case they have the burden of proving (1) that an overriding state interest justifies and indeed requires a quota for certain groups defined by race; and (2) that no feasible alternative procedures are available for assisting prospective law students from "culturally disadvantaged" homes, whether their parents are white, black, Indian, Asiatic or Mexican-Amer-

ican. The Respondents have not presented convincing factual testimony on either of these points. The record is devoid of evidence that the Respondents have exhausted or even attempted other methods for assuring equal educational opportunities to members of the racial groups in whose favor the quotas were established.

The Committee does not believe that a "Brandeis Brief," based on the full array of the relevant social science data, would support the Respondents' contention here.

But the fact—and technically the decisive fact in this case—is that no such effort has been made. The Court is being asked to legitimize a racial quota on the basis of vague and general opinion testimony, assumed to invoke social facts of common knowledge. In essence, the Respondents are asking this Court to take judicial notice of the compelling power of their major premise. Questions of the Fourteenth Amendment and other legal authorities aside, that premise—the contention that some racial quotas are benign, and should be condoned—is one of the most difficult and controversial questions in social and behavioral science research. This Court should not consider that contention on the basis of the record in this case.

The modern jurisprudence of the Fourteenth Amendment is a proud page in our national history, and one of the great achievements of this Court. Its magisterial force should not be qualified by an affirmance of the judgment below, which would constitute a precedent at least as dangerous, and far more pervasive in its impact, than *Hirabayashi* v. *United States* itself.

In general, the Committee concurs in and adopts the arguments contained in the brief of the Anti-Defamation League of B'nai B'rith as *Amicus Curiae.*

Conclusion

The judgment below is clearly inconsistent with the Equal Protection Clause of the Fourteenth Amendment and should be reversed, on the minimal ground that the Respondents have not met the burden of proof called for by their theory of the case and on the broader and more fundamental ground that the practices established in the record constitute a violation of petitioner's right to the equal protection of the laws.

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FILED
FEB 20 1974
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1973

Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife,

Petitioners,

vs.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Washington

BRIEF OF LAW SCHOOL ADMISSION COUNCIL AMICUS CURIAE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-235

Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife,

Petitioners,

vs.

Charles Odegaard, President of the University of Washington; Richard L. Roddis, Dean of the University of Washington Law School; Richard Kummert, Robert T. Hunt and Richard L. Roddis, Admissions Committee of the University of Washington Law School; Harold S. Shefelman, James R. Ellis, R. Mort Frayn, Robert L. Flennaugh, Jack G. Newpert, Robert F. Philip and George B. Powell, Regents of the University of Washington; and Harold Gardiner, Registrar of the University of Washington,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State of Washington

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BRIEF OF THE LAW SCHOOL ADMISSION COUNCIL AMICUS CURIAE

INTEREST OF THE AMICUS

The Law School Admission Council submits its brief as *amicus curiae*, with consent of the parties, to support

affirmance of the judgment below, reported at 82 Wn.2d 11, 507 P.2d 1169 (1973).

The Council's limited purpose is to aid the Court in understanding the complex process of selecting among applicants to law schools, and in avoiding a decision based upon misconception or unfounded assumption. More particularly, the Council's purpose is to assist the Court in steering between the Scylla and Charybdis of the polar positions presented in other briefs: at one extreme, compelling selection solely upon the basis of numerical predictors to the exclusion of other relevant qualifications which numbers do not purport to measure; or at the opposite extreme, forbidding use of those numerical predictors at all because they touch only a part of the appropriate qualifications and do not measure everything. Rejecting both, the nation's law schools should not be foreclosed from giving due consideration to any and all factors relevant to the purposes for which law schools are established and maintained, and should be permitted to weigh in the balance both numerical predictors and other, non-numerical factors, equally relevant, including factors which for the present [sic] time are inextricably associated with race or ethnic background.

The Law School Admission Council is an organization of 148 American law schools, representing nearly all institutions accredited by the American Bar Association. For twenty-five years it has served as the principal organ of cooperation and communication on matters of admission in American legal education. Through the Council, law schools jointly have arranged for services, for which the Educational Testing Service is the principal contractor, widely used in the admissions process. The two major services involved in this case are the Law School

Admission Test, a three-hour written test measuring certain mental capabilities related to academic performance in law school, and the Law School Data Assembly Service, which collects the applicants' college transcripts, converts the grades to a common scale, and computes and reports an undergraduate grade average in comparable figures.

While the Council does not undertake to tell member schools how to select among applicants, it does draw upon its extensive statistical research into all aspects of the process, and upon years of shared experience, to provide recommendations and advice upon the value and limitations of the data generated by these services. Specifically, the Council has consistently warned against overemphasis, typified by petitioner's argument here, upon the numerical predictors supplied by these services: the LSAT score and the college grade average. Although the Council will combine these numbers into a predicted first-year law school average grade (PFYA), at the request of a law school and on the basis of a statistical analysis of its experience, it is directly contrary to the Council's teachings to permit this convenient and useful servant to become the master, controlling the selection process to the exclusion of other important factors which cannot readily be reduced to numbers or fed into a mechanical formula.

The tendency of numerical predictors to discourage or to exclude applicants with atypical backgrounds led the Council in 1963 to embark upon a program to facilitate access to law school, and to the legal profession, for members of minority groups. In furtherance of the goal, the Council has sponsored a series of recruiting conferences and tours, offered the LSAT free at a number of pre-

dominantly Black southern colleges and authorized fee waivers for other economically deprived applicants, served as a founding sponsor of the Council on Legal Education Opportunity, conducted a series of research studies into the possibility of bias in the numerical predictors and into their differential validity, and produced a variety of publications, including newsletters, surveys, reports, and a compilation about special programs titled *"Graduate and Professional School Opportunities for Minority Students"* (ETS, 5th ed. 1973-74). The nation's law schools have individually adopted policies aimed at the same goal of increasing minority enrollment. This published compilation of opportunities for minority students contains announcements of special minority group programs, in the areas of recruitment, admission, financial aid, and tutorial assistance, at more than ninety percent of the hundred-odd law schools listed.

The Council's participation in this case is not attributable to any general policy of the organization to come to the aid of its members. On the contrary, pursuant to its policy of equal opportunity, the Council would as readily support a rejected applicant in proceedings against a member school which had misused the Council's test or services as an instrument of invidious discrimination. Its interest here is engendered by the threatened misuse of these services as urged by the petitioner and supporting amici, and by the danger that such misuse would compel segregated legal education, if not legal education "for whites only." The general policies and procedures followed by the University of Washington are not only typical of those prevailing throughout American legal education; those policies and procedures are also in full accord with the Council's advice and objectives.

Confident in the belief that the legal precedents and authorities will be fully presented by other friends of the Court, this Amicus will confine its presentation to an analysis of the process of selection for admission to law schools, and to the policies and principles reflected in that process, speaking from the Council's accumulated experience and research.

SUMMARY OF ARGUMENT

In allocating a limited number of openings among a surplus of fully qualified applicants, a law school's objective is to select those best qualified to meet the varied needs of the profession, not simply those who show a probability of slightly higher first-year law school grades. Against this broader criterion, there is no basis for petitioner's assertion that he was "better qualified", or that a "preference" was given when applicants were admitted with lower test scores or college grades. The University's announced policy to seek increased enrollment from minority groups merely emphasized the broadened criterion, looking beyond narrow numerical predictors to qualities bearing on the applicant's potential for contribution as a lawyer. In this balance, a number of non-numerical factors are relevant, including the experiential, cultural, and educational background inextricably associated with minority status. Consideration of that status, as one factor among many, is essential to a rational evaluation of the applicant's probabilities of academic success, and, more importantly, of his potential for contribution to the education of his law school classmates and to society at large through his work as a lawyer. To exclude solely on the basis of test scores and college grades, with no evaluation of the applicant's broader capacities for performance in the legal

profession, would raise even more serious questions of Equal Protection.

Viewed in the perspectives of statistical probabilities, and in combination with other predictive factors not reduced to numbers or included in the formula for the predicted first year average, petitioner's test scores and college grades do not establish that he was "better qualified" than admitted applicants with slightly lower numerical ratings. Thus even if Equal Protection forbade consideration of anything but probable relative rankings on first-year law school grades, as petitioner urges, the evidence and findings below fail to raise any significant probability sufficient to compel the conclusion that his grades would be markedly better, or that his rejection was the product of anything other than a fair, even-handed, and reasoned evaluation of his probabilities in comparison with others.

ARGUMENT

Introductory.

Petitioner and his amici invite the Court to render a sweeping decision, embracing not only admission to law school but as well to every other branch of education where admission must be obtained, and to rule upon the validity of affirmative action programs, beyond education, in all areas of employment.

No foundation for such a decision is presented. The petition for a writ of certiorari was granted upon the question, as stated in the Petition, page 6, whether a state law school may give "preference solely on the basis of race to certain persons to the exclusion of others in competition for limited spaces available in the law school." Examination of the record now on file reveals that no such question is presented upon the facts established below. In light of the limited predictive value of the Predicted First Year Average, and the narrow range of difference between petitioner's PFYA and the lower predictions for other applicants, both black and white, who were admitted, no "preference" has been established by the evidence, even if prediction of law school success had been the sole basis of selection by the law school, or if such selection were constitutionally compelled. Thus there is no factual foundation for the tendered question.

Even if petitioner had established that he was "better qualified" than accepted minority applicants in terms of a probability of obtaining a higher first-year law school grade average, no preference would be established in

terms of the actual criteria used by the law school to select among well qualified applicants: ability to make significant contributions to law school classes and to the community at large. No evidence was offered, no finding was made, and no claim has been advanced, that petitioner was "better qualified" by this standard. Moreover, the record fails to reveal any causal relationship between any supposed preference and petitioner's failure to qualify, since there were more than enough non-minority applicants ranked ahead of him to fill the class if no minority applicants had been accepted. Since the question tendered by the petitioner is not presented in the record, it is respectfully suggested that the writ was improvidently granted.

I. QUALIFICATION FOR LAW STUDY AND THE LEGAL PROFESSION IS NOT DETERMINED SOLELY BY PREDICTIONS OF FIRST YEAR LAW SCHOOL GRADES, TO THE EXCLUSION OF OTHER RELEVANT FACTORS, INCLUDING MINORITY STATUS.

This case would not have arisen ten years ago. It is a product of the times, of population growth, increased college attendance, and the enhanced popularity of law as a career. From 1967 to 1971, the number of applicants to the University of Washington Law School rose from 618 to 1601, in parallel with the national trend evidenced by the increase in the number of persons taking the LSAT from 47,458 to 107,147 in those years. The change in volume confronted the law schools with questions different in kind, not merely in degree. When acceptances could be offered to roughly half the applicants (with some 300 invitations necessary to fill 150 seats, and 600 applications), the admissions function was essentially negative, simply a matter of denying applications from those who had no reasonable prospect of completing

the course of study in law school, and leaving the remainder, who were qualified in this sense, to be accepted. With the increase, it became necessary, for Washington and other law schools, to deny four times as many applicants, most of whom were fully qualified in the sense of minimal competence, would have been welcomed to law school classes of previous years, and presented credentials better than their predecessor applicants of a few years before who had become successful practitioners and leaders of the bar. What had been a process of exclusion of the unqualified was thus transformed into a process of selection from among the well qualified. The purpose was no longer to assure minimal competence, as by a bar examination, but to make a rational allocation of scarce resources, as in the award of television licenses* or the choice of law clerks for the Justices of the Court. The change in the question worked a change in the data relevant to the answer; the prediction of law school academic success diminished in significance in choosing among clearly qualified applicants so similar on this measure that no meaningful distinctions could be drawn. Now the scales are tipped by other factors in the balance, factors which cut directly to the root purpose of the selection process and flow from the ultimate goals of legal education.

a. The Objective of Selection Is to Meet the Public Need for Lawyers.

The underlying objective of legal education, and the justification for public support and maintenance of law schools, is to serve the public interest by providing lawyers

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* See *TV 9, Inc.* v. *Federal Communications Comm'n*, ...F.2d..... (U.S. Ct. App. D.C. Cir., No. 72-2049, Nov. 6, 1973) (directing that consideration be given to minority status of license applicant).

who will contribute in the manifold work of the legal profession in all its branches, and who will fill the varied jobs where law is made and enforced. This public purpose defines the shape of the criterion for selecting law students. The University of Washington announced this target in plain phrases: the "ability to make significant contributions . . . to the community at large" above and beyond "potential for outstanding performance in law school" and the capacity to make "contributions to law school classes." App. 34-35.

To do his job, the lawyer must have certain intellectual equipment, including a working knowledge of basic legal principles, analytical abilities, and verbal fluency. Hence the requirement of a law degree for admission to the bar, and of probable law school success for admission to law school. But there are other qualities of the lawyer, equally important to his function, which law schools do not teach, law school examinations do not test, and law school grades do not measure.

Law school grades signify little or nothing about whether the graduate has the special qualities of the trial lawyer, whether he can be entrusted with responsibility for the vital interests of others, whether he has a judicious temperament, whether he can bring empathy and understanding to the plight of a client, or whether he is dedicated to public service. The lawyer's work is varied, and different kinds of people with different qualities and motivations are needed for different jobs: for general practice in the small town, for metropolitan firms, for elective office and government posts, for the bench, for the corporate legal staff,—in sum, to provide needed legal services for all sectors of society. Choosing the prospective lawyer is thus a complex process, far re-

moved from the selection of a typist or assembly line worker. It is, inherently, a matter of prediction and probability, weighing a number of factors in complex combination.

No doubt some law school committees would be relieved to deliver their thousands of application files to a court upon a bill of interpleader, with the applicants directed to interplead their conflicting claims for acceptance. The root issues, however, are educational, not legal.

Conceivably the process could be fully quantified, with every factor assigned a numerical value and the decision remitted to a computer. Points could be given to approximate the appropriate weight and probability for each factor and quality, with the minimum point total for admission determined by the competition. Some applicants would exceed the minimum with little but superior intellectual ability, since brilliance is useful in law school classes. Others would counterbalance a lesser academic promise with added points for their ability to bring different perspectives to classroom analysis of legal issues, with viewpoints derived from cultural backgrounds not otherwise represented in the mix. Still others would gain points for their potential to make significant contributions after graduation, because of their motivations, career plans, or personal qualities. If such a mechanical system could be devised, however, the blunt, mindless formula would produce nothing more than a rough approximation of what is already being done, and would sacrifice the sensitive gradations and subtle perceptions now contributed to the evaluative process by the collective judgment of law teachers and administrators. But equal protection does not command equal numbers, and mathematics holds no monopoly of reason and fairness. Like

the delicate weighing of competing interests required for judicial decision in a complex case, the selection process is neither arbitrary nor capricious because some of its vital components are not reduced to numbers but are left to human judgment.

b. All Factors Relevant to the Applicant's Potential for Contribution as a Lawyer Should be Weighed in the Balance.

The essential command of Equal Protection, like the ultimate objective of law school selection, is that all evidence relevant to the purpose at hand must be accorded its due weight, and no more. For example, it would be unreasonable, arbitrary, and perhaps unlawful for a law school to look only to the Law School Admission Test in the selection process, and to refuse to consider other factors which bear upon an applicant's potential for academic performance in law study, for enriching the education of his classmates, or for useful service as a lawyer. This is the basic teaching of *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971): that a standardized test may not be used as the sole ground for excluding those who might prove fully qualified for the job if other evidence were considered. On the other hand, it would be equally unreasonable and unwise to refuse to consider available LSAT scores, since they have been proved to be valid and reliable measures of a significant ability requisite to law study. The same perspective and balance is required in the use of other factors relevant to the goal served by the selection process: college grades, college professors' recommendations, work experience, military service, extracurricular activities and accomplishments, and biographical data such as age, sex, residence, marital state, and minority status. All are related

to the objective of providing able lawyers for the work that needs doing, but grave questions of Equal Protection would be raised by the unreasoning use of any one factor as the sole determinant and absolute prerequisite. Of course, in cases where all other things are equal between two applicants for the last seat, the differentiating factor alone is left to tip the scales. Thus minor differences in numerical predictors may be dispositive between applicants with identical backgrounds, while a major difference in background factors may counterbalance an otherwise significant numerical disparity. But this use of a factor, appropriately weighed in a rational balance, does not involve forbidden discrimination on the ground of that factor, whether it be the score on a standardized test or age, sex, residence, or cultural, ethnic or racial background. On the contrary, to refuse to give the factor its appropriate due, and to base decisions solely on the incomplete evidence which remains, would be discriminatory and unreasonable.

This balanced evaluation involves no "quota", benign or invidious, in the sense of an *a priori* number or ratio. There is no seat for which any applicant is ineligible by reason of race, and all are equally evaluated by the same committee against the same ultimate public purpose and objective.

c. Minority Status is a Factor Relevant to an Applicant's Potential for Contribution.

The corollary principle, forbidding the use of factors which bear no reasonable relation to the legitimate objectives of selection, is governed in its application by the scope of the objectives. Minority status is not unrelated or extraneous to the goals of legal education, so that its limited use in selection could fairly be called a "pref-

erence." The relevant fact is not race in any genetic or biological sense, but rather the cultural background which, in this era and in this nation, is inextricably interrelated with perceived membership in such a minority group. Within this generation, race has been the explicit basis of segregation and discrimination commanded, sanctioned, or tolerated by state and local law, in the realms of public education, housing, and employment. The handicaps thus visited on members of minority groups bear directly on the appraisal of their pre-law educational attainments. The mere earning of a college degree in such a climate demonstrates drives, motivations, and aspirations relevant to performance in the law which college graduation does not import for a middle class white. A proven capacity to catch up in learning, and the distance between where he started and where he now stands, may be more important to prediction than a comparison of his present level of attainment with that of others who had no headwinds to overcome. Standardized testing is not so familiar in segregated or vocational schools, where college preparation is not emphasized, and the verbal abilities measured by such tests—and by law school examinations—are seldom developed in such an environment. From a background with a different culture and values, the minority law student can contribute to the education of his classmates in the workings of law and government in a pluralistic, multi-racial, and vari-cultured society. And his contributions as a lawyer, judge, or public official may be enhanced and enriched by his background. In sum, minority status bears a direct and legitimate relevance to every objective of the selection process, and no rational process of evaluation can be color blind.

The purpose is not to provide proportional representation for every sub-group of society, to make each law school class a perfect microcosm of the nation at large. It is rather to supply lawyers best qualified for the many tasks of the legal profession.

As with other factors, the relevance of minority status rests upon inference and probability founded in experience. The use of minority status as evidence of probable educational handicaps, varied experience, or cultural values is no less reasonable than the use of military service as evidence of probable discipline and maturity, or the use of good grades in Latin as evidence of probable good grades in law school. Within the limits of time, effort, and resources available for the selection process, a detailed inquiry cannot be conducted to verify, as to every individual, every inference drawn from reason and experience. Morover, even with infinite resources, there are no sure means to measure the truly relevant fact, not the nature of the individual's experience, but its impact on his mind and on his probable future behavior. Finally, the effort to ascertain the precise degree of each minority applicant's deprivation would inevitably conflict with interests of privacy, with inquiries into father's occupation, mother's education, family income, and even more sensitive personal data.

Petitioner has built his claim of discrimination by narrowly redefining the objective of selection to embrace only probable first-year grades. The test is too narrow; many law schools have abandoned class rankings, especially in the first year, and a significant minority assign no first-year grades at all, but use a Pass-Fail system. When qualification is measured by the broader criterion of potential for the legal profession, the supposed preference evaporates.

II. EVEN IF PROBABLE RELATIVE LAW-SCHOOL GRADE RANKING WERE THE SOLE PERMISSIBLE CRITERION, THE PREDICTION BASED ON RAW TEST SCORES AND COLLEGE GRADES WOULD NOT ESTABLISH THAT PETITIONER IS BETTER QUALIFIED.

a. The Predicted First Year Average Reflects Only a Shifting Range of Probability.

The position of petitioner and supporting amici proceeds from the unstated premise that the PFYA (predicted first-year average) carries some intrinsic truth, and is an accurate measure of who is "better qualified" for law school and of who has "lower qualifications." Accepting for purposes of argument their corollary premises that probable law school success must be the dominant if not the exclusive basis of selection, the PFYA has inherent limitations which petitioner has chosen to ignore. It is, by definition, a *predicted* average grade in the first year of law school, a statement of the odds, not a measure of actual achievement. The petitioner's PFYA of 76.23 imports a beguiling certainty, and implies a significant margin of superiority over the 74.50 line of presumptive rejection. In actuality, however, the PFYA is only a convenient shorthand expression for the probability that the *average* of the *grade averages* of students admitted with a combination of test scores and college grades like petitioner's will be in that range, on the basis of the experience of earlier classes. The number, with its delusive precision, serves to conceal the *certainty* that many students with a PFYA of 76.23 will achieve first-year grades well below that mark, and that others will do much better than that prediction.

In conventional statistical terms, used in regression analysis, the validity of such a predictor is expressed

as the coefficient of correlation, a two-digit number in hundredths, with .99 as near-perfect prediction and .00 representing no predictive relationship at all. In hundreds of studies, the average coefficient for all law schools has been .42; in the study which generated Washington's PFYA, the coefficient was .39, for practical purposes no different from the national average. This coefficient means that the average student with a specific predictor will achieve law school grades four-tenths (rounding .39 and .42) as far above or below the average of the whole class as he ranked above or below the average on the predictor, with distance above or below the average measured in conventionalized units or "standard deviations." From the coefficient of correlation and standard deviation, a third figure is derived, the standard error of estimate, expressing the probable scatter of students with a given predictor above and below their predicted grades. For the University of Washington in the relevant year, these statistical analyses meant only that the probabilities were that one-third of the group, including petitioner, with PFYA's of 76 would achieve law school averages between 74 and 78, with the others falling evenly above or below. In comparison, a PFYA of 74, below the line of presumptive rejection, expressed the probability that half those students would do better, and half worse, than the prediction, with the same scatter. Thus the difference between petitioner's 76 and another applicant's 74 meant only that petitioner had two chances out of three of doing better than 74 in law school, while his competitor for the seat with a 74 PFYA had a fifty-fifty chance of exceeding that grade. But the *average* law school grade used in the prediction was 74.4 so the comparison discloses not relative chances of failure, but relative chances of ranking in the upper half of the class.

b. Differences in the PFYA's in Question are Minor.

Probability aside, the PFYA also diminishes in significance when viewed in the light of its sensitivity to minor changes in its component sources. An applicant who received the identical scores attained by petitioner on his first try at the LSAT, but who did not bother to retake the test, and who had an identical college record except that he took four different and harder courses than petitioner, earning B's where petitioner received A's, would have a PFYA of 74.46, so low that in the words of the trial judge, he would have been "summarily denied." App. 53. In other words, the differences in PFYA portrayed by the trial judge, petitioner, and his amici as a grand gulf of separation emerge, upon analysis, as fine lines indeed.

The same sort of examination should serve to dispel any misapprehension that the minority students accepted by the law school were not "qualified" for the study of law or to become lawyers. Each was a college graduate with at least a bachelor's degree. The average of the 41 minority applicants admitted as of August 1, 1971, had earned a combined grade average for his junior and senior years in college in excess of a B (3.04), and had an average score on the LSAT of 534 (compared with petitioner's original score of 512) and an average Writing Ability score of 52, both above national averages. With these credentials, the formula employed to produce the PFYA predicted that one-third of these minority students would rank in the top half of the law school class.

Statistical predictions perform a useful but limited service, in winnowing out those applicants who have no reasonable prospect of passing. Once that threshold is crossed, their utility is attenuated if not exhausted. One

view, widely if not generally held among experts in admissions processing,* holds that relative predictions should be wholly ignored in choosing among applicants who satisfy a minimum standard of probable success. Beyond that point, a lottery would be fair if not rational. If reason is used instead of chance, geographic diversity may provide the standard, as in the case of the United States military service academies. Foreign students may be sought, or applicants from a variety of colleges, or major disciplines, or pre-law experience, or cultural backgrounds. In any event, when it is probable that competing applicants will rank solidly in the middle of the class, a minor shift of probable rank in that range carries little meaning. For this very reason, many law schools refuse to provide a numerical ranking of their students.

Admission to law school is not a prize, like a Phi Bet Kappa key, awarded for excellence in undergraduate studies, nor a reward for a high LSAT score. College grades and test scores are relevant because—and to the extent that—they predict law school grades. In turn, law school grades are relevant because they help to predict success in the practice of law. Prediction of human behavior is an inexact science, and one can be grateful that it is, so that no one is predestined and incapable of surpassing his probabilities. Minor departures from the strictures of statistics in this field can be misconceived as preference for the "less well qualified" over the "better qualified" only by those who are innocent of the limits of prediction and who place too much trust in numbers.

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* *See, e.g.*, Thorndyke, *Concepts of Culture-fairness*, 8 Journal of Educational Measurement 63-70 (1971); Darlington, Another Look at "Culture-fairness," 8 Journal of Educational Measurement 71-82 (1971).

c. Raw Test Scores and College Grades Must be Corrected and Adjusted in Light of Non-Numerical Factors.

Raw college grades and test scores are not immutable, precise, and objective. Even if prediction of law school grades on these limited factors were the sole criterion, the numbers are subject to correction on the basis of other data. For example, the PFYA of most of the applicants to the law school was computed on the basis of grades for only part of the work of their senior college year at best, since unlike petitioner, they had not yet been graduated when their applications were submitted. Additional transcripts, showing subsequent work, were considered in the deliberative process without recomputing the PYFA. App. 23-24 Examination of the full transcript might call for other adjustments as well. Here the first two years of college for the petitioner had been less strong, and a preference might logically be given to a competing applicant with the same junior-senior average entered into the PFYA, but with a better four-year average. Evaluation of the raw college average is informed by some familiarity, available to law school admission personnel, with the prevailing grading practices at the institution attended. At one college or university, a B+ may be only an average grade, ranking at mid-class, while at another a B+ student may stand in the upper ten per cent. The same disparity may exist between departments in a single college. Even if the same average grade is given, one college or university may be more challenging and demanding than another, so that a student who is only average at a difficult school would have led the class in a smaller pond. Different major fields of study make different demands, and have varying relations to law study. Many colleges offer an option to students to take courses without re-

corded grades, on a pass-fail basis. The PFYA excludes such work from the computation, and a reasonable admissions committee may choose to make a downward adjustment in the prediction for an applicant whose transcript reveals a heavy proportion of such courses.

Admission test scores are also subject to correction and adjustment. The reliability of the LSAT has been fully studied and researched, revealing that the reported score might have been 30 points higher or lower with no change in the applicant's aptitude. Other studies suggest that English majors, with greater fluency, may be slightly overpredicted by their scores. By the same token, an older applicant who has been out of college for several years and removed from the testing process may do less well on the test than on his law school examinations. Familiarity with the design and style of such tests confers an advantage which must be discounted for applicants who are repeating the LSAT or come from an educational system where such standardized tests are more commonly administered.

All such corrections and adjustments are commonplace in the admissions process, taken into account in the judgmental process. Petitioner's reliance on raw numbers to prove a preference ignores them.

d. Rational Prediction Must Take Account of Other Predictive Factors, Unrelated to Test Scores and College Grades.

There is no cause for surprise in the fact that the PFYA does not predict perfectly. The prediction can rise no higher than its source. Rather, it is remarkable that a three-hour multiple-choice test, wholly dissimilar from the typical law school examination, has proved itself in

hundreds of research studies to be roughly as valid as a predictor of law school grades as four years of college, and that it adds significantly to prediction when combined with college grades. Those grades, while measuring general academic motivation and the capacity to master a body of material, have a limited predictive power because legal education is unlike college education. Courses in mathematics or foreign languages offer little guidance for law school performance.

The PFYA does no more than it purports to do: to measure, with reasonable accuracy, some of the mental capacities requisite to the study of law. Its prediction is imperfect, in part because it takes no account of other factors, abilities, and qualities which enter into law school performance. A reasonable selection process looks beyond the PFYA, as petitioner's argument does not, to weigh those non-numerical factors. The typical admissions committee has before it a variety of information about the applicant beyond his college grades and test scores. Recommendations from his college professors and others who can evaluate his potential will offer insights. The applicant ordinarily supplies a brief personal statement, often revealing his motivations for studying law, his experience, attitudes, and expectations. The application materials disclose significant information about his background, including such things as his place of residence, family situation, age, sex, marital status, father's occupation, or his emancipation. His work experience, military service, extracurricular activities, and significant achievements are reported. Other information may be provided by an interview of the applicant, by casual contact, or by his correspondence with the admissions office.

It is commonplace that some law students fail to make full use of their abilities, while others excel with modest

natural talent. Some who were uninterested by college work, or unchallenged by it, concentrate their energies on the study of law, while others find the discipline uncongenial. One student may be driven by a commitment to become a lawyer, while his equally able classmate may plan a career in business. Factors such as these are intangible but nonetheless real, and important determinants of law school success. Their use is illustrated not only by the fact that the Washington law school denied admission to 29 candidates with PFYA's higher than petitioners', and admitted 38 non-minority applicants with lower PFYA's, but also by the facts presented in the *Pre-Law Handbook: Official Law School Guide* (AALS-LSAC, 1973-74). A majority of law schools have included in this publication a chart showing the numbers who applied and the numbers who were accepted in each range of test score and college grades. Perusal of the charts will counter any notion that admission is controlled by numbers alone, and will reveal no fixed score or grade average above which all are admitted and below which all are denied at any schools.

e. Predictions Based on Test Scores and College Grades Must Be Ameliorated for Minority Backgrounds which Restrict Opportunities to Acquire or to Demonstrate Academic Abilities.

It is fashionable to refer to unquantified factors as "subjective", in contrast with "objective" test scores and college grades. The terminology may be taken to imply that numerical predictors are somehow neutral, impartial, and untainted by any tinge of bias or human error. The implication will not survive scrutiny. The use of such objective standards in this case would have admitted one-fifth of all non-minority applicants, but only one of 72

Blacks, Chicanos, American Indians, and Filipino-Americans. The pattern is typical, as this Court took notice in *Griggs* v. *Duke Power Co.*, 401 U.S. 430 (1971), dealing with a like requirement of a passing score on a standardized test or of requisite educational attainment (a high school diploma), which "operate to disqualify Negroes at a substantially higher rate than white applicants." 401 U.S., 426. "This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools. . . ." 401 U.S., 430.

The Court's observations are borne out by repeated studies. For example, the past week's news announced results of research supported by the U.S. Office of Education, examining changes in I.Q. scores over the eight-year period of primary education for 2000 Pittsburgh children, half of whom were black. The scores declined for children, black or white, who attended lower class, predominantly black grammar schools, while scores increased for students, black or white, who attended predominantly white middle class schools.*

The typical minority applicant who applied to law school with petitioner was born in the year when this Court decided *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), and grew up in an era of segregated housing. He entered public school the year this Court decided *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and was entered into a system of segregated education. He was sixteen and ready for the job market when Congress prohibited discrimination in employment with the Civil Rights Act of 1964. It is in-

* Reported in Time, Feb. 4, 1974, pp. 66-67.

sisted, however, that the law school was forbidden to take account of these cumulative handicaps because it had not previously been adjudicated guilty of any racial discrimination. The argument leads to the remarkable conclusion that the Constitution compels the innocent to become complicit to the wrongful discrimination by enforcing its consequences and excluding the victim because he has been wronged in the past by others. At each succeeding educational level, the victim would be met by further discrimination, produced by the handicaps visited upon him in the level below. No remedial action would be permitted to aid the actual victim, since this view of the law would "freeze the status quo of prior discriminatory . . . practices." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971).

The consequences of discrimination are inextricably interwoven with minority status, and their educational impact has not been ignored by this Court, the Congress, or the law schools. The ultimate goal of a society where hard work and ability alone are controlling, and origins, birth, and status are disregarded, can be achieved only when handicaps visited upon origins, birth, and status have first been eliminated. That day has not yet arrived.

CONCLUSION

The judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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FEB 21 1974

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,
Petitioners,
v.
CHARLES ODEGAARD, *President of the University of Washington, et al.,*
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS IN OPPOSITION TO AMICUS CURIAE BRIEFS OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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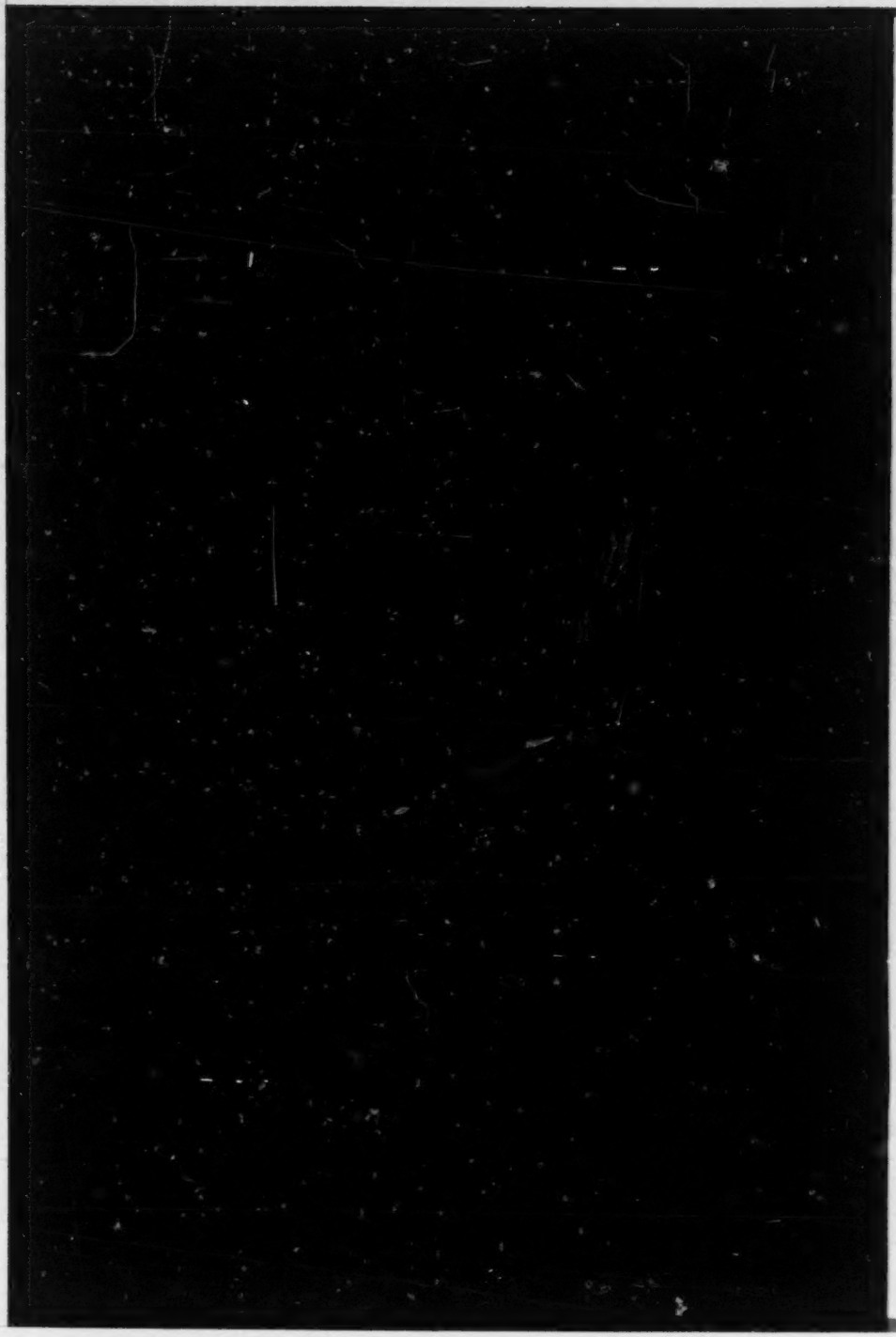
February 19, 1974

UNIVERSITY OF WASHINGTON, DEPARTMENT OF PRINTING



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AUTHORITY FOR THIS BRIEF

This brief is submitted in accordance with the provisions of Supreme Court Rule 41(3) and (5) and pursuant to the understanding concurred in by the Clerk of the Court that respondents would be permitted to submit a reply brief in accordance with Rule 41(3) to respond to any new matters raised by the briefs of the Anti-Defamation League of B'nai

B'rith (herein referred to as ADL) and the American Federation of Labor and Congress of Industrial Organizations (herein referred to as AFL-CIO), *amici curiae*, who, with the consent of the parties, served their briefs on the respondents on January 29, 1974, and January 21, 1974, respectively, well after the regular date for the filing of said briefs in support of the petitioners and too late to be adequately considered in the respondents' opposing brief on the merits.

ARGUMENT

I

INTRODUCTION

In addition to the briefs submitted by the parties in this matter, this Court has been afforded an unusual number of *amicus* briefs by an unusual variety of *amici* which indicates the importance of the decision of this Court in this matter and the effect its decision will have on individuals and interests that span virtually all aspects of contemporary American life.

Thus, we find *amici* supporting the petitioners that include not only the Anti-Defamation League of B'nai B'rith but the American Jewish Congress, the Jewish Rights Council, and the American Jewish Committee, as well as the Advocate Society, representing a group of Polish attorneys in Chicago, and the Joint Civic Committee of Italian-Americans, and UNICO National, representing organized Italian ethnic interests. Yet, it can be seen that even ethnic groups who may, understandably, feel concerned over a minority admissions program in higher education which favorably considers other minorities who are under-represented within the legal profession, show no unanimity in the nature of their concern. For

example, the National Council of Jewish Women and the Union of American Hebrew Congregations, Commission on Social Action, have joined in the *amicus* brief of the Children's Defense Fund (herein referred to as CHILDREN'S DEFENSE FUND) in support of the respondents.

Similarly, while we find the AFL-CIO appearing *amicus curiae* in support of the petitioners, we find international labor organizations, some of whom are affiliated with the AFL-CIO, *e.g.*, the United Auto Workers, the United Mine Workers, the International Union of the American Federation of State, County and Municipal Employees, and the United Farm Workers of America, supporting the respondents by their appearance on the *amicus* brief of the Children's Defense Fund.[1]

Law schools and higher education generally,[2] as well as the legal profession,[3] have submitted briefs in support of the

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1. The United States Chamber of Commerce seeks appearance on behalf of the petitioners as *amicus curiae*. Since its request was not received by respondents until after our brief had been submitted to the printer, we declined to consent to the filing of that brief. A copy of our letter of denial of consent is attached as Appendix A.

2. See, *e.g.*, Brief of the President and Fellows of Harvard, *amicus curiae* (herein referred to as HARVARD); Brief of a group of Law School Deans (60), *amici* (herein referred to as DEANS); Brief of the American Association of Law Schools, *amicus* (herein referred to as AALS); Brief of American Association of Medical Schools, *amicus;* Brief of Rutgers University, *amicus* (herein referred to as RUTGERS); Brief of the National Organization of Women, *amicus,* in which the National Education Association has joined (herein referred to as NOW); Brief of the Deans of Antioch College, *amici* (herein referred to as ANTIOCH); Brief of the Center for Law and Education, Harvard University, *amicus* (herein referred to as CENTER); Brief of the Council on Legal Education Opportunity, *amicus* (herein referred to as CLEO).

3. See, *e.g.*, Brief of American Bar Association, *amicus* (herein referred to as ABA); Brief of Lawyers Committee for Civil Rights Under Law, *amicus* (herein referred to as LCCR); Brief of National Conference of Black Lawyers, *amicus* (herein referred to as BLACK LAWYERS); Brief of Legal Aid Society of Alameda County et al., *amici* (herein referred to as LEGAL AID).

respondents' admissions program. National associations representing women, Blacks, Japanese-Americans, Mexican-Americans, Puerto Rican-Americans, and Indian-Americans, have all either submitted briefs or joined the briefs of others in support of the respondents' admissions program.[4]

In addition, respondents have been supported by the State of Ohio[5] and the City of Seattle,[6] concerned governments which recognize the effect a reversal in this case would have on their vital governmental functions.

We believe these briefs, together with the respondents' opposing brief on the merits, adequately respond to all of the arguments made by the *amici* Anti-Defamation League of B'nai B'rith and American Federation of Labor and Congress of Industrial Organizations in support of petitioners. It is not our intention here to repeat arguments already made but simply to call this Court's attention to the way the ADL misidentifies the issue in question. We also wish to call the Court's attention to some of the arguments of the *amici* supporting the respondents which are particularly responsive to the apparent quest of the AFL-CIO to use this case to achieve reversal of Courts of Appeals' decisions upholding affirmative action programs in the construction trades.

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4. See, *e.g.*, CHILDREN'S DEFENSE FUND; Brief of the NAACP Legal Defense and Educational Fund, Inc., *amicus* (herein referred to as NAACP, INC.); Brief of the American-Indian Law Students Association et al., *amici* (herein referred to as INDIAN-AMERICANS); Briet of the Mexican-American Legal Defense and Educational Fund et al., *amici* (referred to herein as MEXICAN-AMERICAN.)

5. Brief of the State of Ohio, *amicus* (herein referred to as OHIO).

6. Brief of the City of Seattle, *amicus* (herein referred to as SEATTLE).

II

AMICUS BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

Counsel for the Anti-Defamation League insist upon presenting the question to this Court in the term of "racial quotas," (ADL 2, 17, 18) yet they never define that term. Respondents are sympathetic and sensitive to the "particular concern of the Jewish minority in this country over the use of a racial quota as a means of discriminating against Jewish minorities, both in Europe and in the United States." (*Id.*, p. 3.) We are also aware that the United States Congress has finally abandoned an immigration policy based on national origin quotas, a policy which was divisive in this country and unfair to persons seeking to emigrate to this country. But counsel are wrong when they argue that this case raises the issue of racial quotas. Respondents have never conceded that it does (Resp. Br., p. 2, n.1; p. 14, n.11), and petitioners have never claimed that it does.

A "quota" is defined in *Webster's Third New International Dictionary* as follows:

> "Quota—*n*—
>
> 1) A proportional part: SHARE; esp: the share or portion assigned to each in a division or to each member of a body
>
> . . . .
>
> 3) the number of immigrants allowed to enter a country in a particular year . . .
>
> 4) a *fixed* number or percentage of minority group members who may be admitted into some activity or institution . . .
>
> Quota—*vt:* to divide or *fix* by quotas."
>
> *Webster's Third New International Dictionary*, p. 1868, G. & C. Merriam Co., 1971. (Emphasis supplied.)

The only quota that concededly was fixed in this case was that set by the University for the number of seats open in the Law School class to which petitioner DeFunis sought admission, *i.e.*, 149 places to be filled from a pool of 1,601 applicants.

As has been well stated by Mr. Jack Greenberg and his associates and as the record in this case bears out, the University of Washington and its Law School aimed for a goal of greater representation of certain racial minorities in its Law School in order to improve the legal education of all of the students in the Law School and to increase the representation of such minorities in the legal profession. (NAACP, INC., p. 8.)

As Ms. Marian Wright Edelman stated in CHILDREN'S DEFENSE FUND, page 64:

> ". . . If the petitioner had shown that the school, in 1971, admitted a rigid 'quota' of minority applicants or admitted actually 'unqualified' minority applicants, this would be a difficult case . . . but the petitioner did not make any such showing.
>
> The most that the record reveals is that the Law School sought a 'reasonable representation' of minority students —not a 'quota' . . ."

Ms. Edelman goes on to observe, *id.*, at 65, that rather than setting quotas or ratios the University of Washington's "goal" was "reasonable" representation which was both highly flexible and consistent with the overall "discretionary" nature of its admissions process. (*See also* CLEO 20.)

We agree with Professor Cox that questions relating to "fixing a specific numerical target for the admission of at least minimally qualified minority appplicants . . ." be reserved for another case which presents such issues in its record. (HARVARD, pp. 50-51.)

Since the Anti-Defamation League brief is arguing a question which is not presented by the record in this case, it should be disregarded by this Court.

III

AMICUS BRIEF OF THE AFL-CIO

Counsel for the AFL-CIO, after reciting its own efforts in achieving greater minority representation within its affiliated unions under its federally-funded "Outreach" program (AFL-CIO, pp. 6-9), argues that while consideration of race is essential for the purpose of bringing greater minority representation into the journeyman trades, it is not only unessential but unconstitutional for the University of Washington and other higher education institutions to do the same when operating their "apprenticeship" programs for the professions.

Respondent University of Washington is well aware of the struggle to obtain greater minority representation in the construction trades. As a major federally-funded contractor, it has been a party to important litigation seeking to compel the building trades in the Seattle area to achieve greater minority membership in their work force. *See, e.g., State of Washington; Board of Regents, University of Washington; et al. v. Baugh Construction Company et al.; Asbestos Workers, Local 7, et al.;* U.S.D.C. W.D., Wash., Northern Division, Civil Action No. 8552; *United States v. Ironworkers, Local 86*, 443 F.2d 544, (C.A. 9), *cert. denied* 404 U.S. 984.

The AFL-CIO seems to be using this case to ask the Court to reverse those important courts of appeals' decisions upholding affirmative action employment programs in the construction industry which this Court has denied review. (AFL-CIO, pp. 21-24.) Those cases are carefully discussed by the City of

Seattle in its *amicus curiae* brief filed herein. (SEATTLE, pp. 9-11.)

Those cases support an affirmance in this case. If they are right, then this case, *a fortiori*, should be affirmed since it is specifically concerned with an important element missing in those cases, *i.e.*, the goal of achieving a better educational program for *all* the students in the Law School. (*Cf.* HARVARD, pp. 19-29; CHILDREN'S DEFENSE FUND, p. 45; *see, also*, LEGAL AID, pp. 39, 50-51; DEANS, p. 22; LCCR, pp. 27-28; ABA, pp. 18-19; NOW, pp. 14-15; OHIO, pp. 17-18; BLACK LAWYERS, p. 9.)

Respondents believe that the decisions which the AFL-CIO attacks in its brief are right. We do not believe that this case should provide a vehicle for their reversal.

CONCLUSION

Respondents believe that Ms. Marian Wright Edelman stated it well in the conclusion to her brief (CHILDREN'S DEFENSE FUND, p. 68):

> "No doubt, it is tempting to some to believe that the job is over, that now we all can relax. The 1960's are behind us, to be sure. But the task we set for ourselves then will not be accomplished quickly; surely it has not been accomplished yet. From the Congress to the Executive and down to smaller state institutions like the University of Washington Law School, Americans have grasped the tool of 'affirmative action' and have been using it reasonably and effectively. The potential for real progress can now be seen.
>
> The question here is whether the Court will now take that tool from the hands of those who have been using it for almost half a decade now. We urge the Court not to do so, and let the progress along this historic path continue."

For the reasons set forth in respondents' briefs and in those of the *amici* supporting them, we urge that the judgment of the Supreme Court of Washington in this case be affirmed.

Respectfully submitted,

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APPENDIX A

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January 28, 1974

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Washington, D.C. 20006

Re: DeFunis et al. v. Odegaard et al.
U. S. Supreme Court No. 73-235

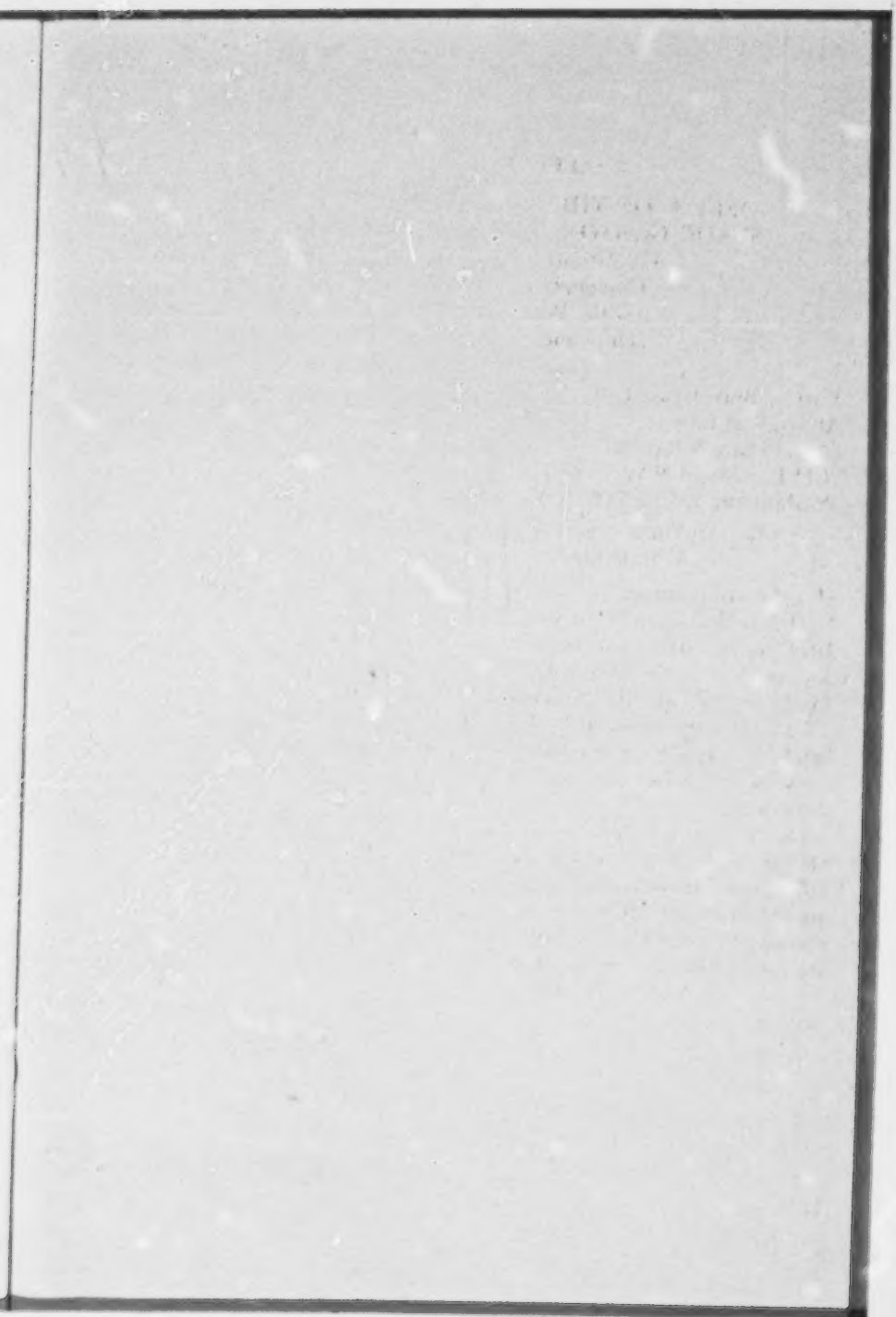
Dear Mr. Braverman:

This will acknowledge receipt of your letter of January 25, 1974, on this date. You request our consent to the filing of an *amicus* brief in the above matter supporting the "apppellants." Briefs of the appellants/petitioners were due on January 3, 1974, and were received by us at that time. While two amicus briefs in support of the petitioners were filed late with our consent, we were advised well in advance of the content of those briefs.

Our own briefs have now gone to the printer and will be filed with the Court on the day they are due, i.e., February 1, 1974. Since the matter has now been scheduled for argument on February 26, 1974, we do not see how we can reasonably consent to your filing a brief at this late date. Therefore, we are not giving our consent on behalf of the respondents as you have requested. I am sorry that we cannot be more accommodating.

Very truly yours,
/s/
James B. Wilson
Senior Assistant Attorney General
Chief, University of Washington
Division

JBW/gg
cc: Lycette, Diamond & Sylvester
Dean Richard S. L. Roddis
AIR MAIL



COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-235

MARCO DEFUNIS and BETTY DEFUNIS, his wife; MARCO DEFUNIS, JR. and LUCIA DEFUNIS, his wife,
Plaintiffs-Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington; RICHARD L. RODDIS, Dean of the University of Washington Law School; RICHARD KUMMERT, ROBERT T. HUNT and RICHARD L. RODDIS, Admissions Committee of the University of Washington Law School; HAROLD S. SHEFELMAN, JAMES R. ELLIS, R. MORT FRAYN, ROBERT L. FLENNAUGH, JACK G. NEWPERT, ROBERT F. PHILIP and GEORGE B. POWELL, Regents of the University of Washington; HAROLD GARDINER, Registrar of the University of Washington; and UNIVERSITY OF WASHINGTON,
Defendants-Respondents.

UPON CERTIORARI FROM THE JUDGMENT OF THE SUPREME COURT OF WASHINGTON

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT IN REPLY

Race Is Not a Proper Criterion to Bar One From a Public Benefit

Respondents in their brief (page 19) argue that the Equal Protection Clause does not forbid consideration of race.

We do not not contend that it does.

We do contend that one cannot be barred from public benefits because of his cace.

Had DeFunis been Black, there can be no question that he would have been admitted to the University Law School without hesitation.

It was his race that kept him from being admitted.

It is not necessary to argue that race under no circumstances can be considered if that is necessary to prevent discrimination, but what we are saying is that race cannot be the basis for discrimination. That is what occurred in this case.

In the present case race was not merely *one* consideration by which members of specific minorities were preferred over DeFunis for admission to the law school, but was virtually the *only* consideration.

The trial court in its findings (A-52) held that the Admissions Committee "assumed that all members of minority races, with the exception of Asian-Americans, were deprived persons." This they did without making any further inquiry as to their deprivations or without inquiring as to whether persons of the White race might be also deprived persons (St. 262).

By the preference given to so-called "minority races" the trial court found that DeFunis was displaced by minority students with college grades and aptitude test scores so low that *had they been White their applications would have been summarily denied* (Findings XXIII, A-53).

This was not a matter of the exercise of "committee discretion confined by prearticulated standards" (Resp. Br. p. 17) with respect to admission of individual applicants,

since, in effect, there were *no articulated standards* other than race.

Professor Kummert testified: "We have no definitive standards" (St. 403). The operative considerations that brought about the result of plaintiff not getting into the law school were matters simply not subject to standards. The committee did not establish any standards (St. 403) and no one else established standards for them (St. 403).

Plaintiff was rejected, not upon the basis of objective criteria such as grades, test scores or PFYA, but on the basis of what were referred to in the testimony as "other things" (St. 87). The consideration of "other things" included the preferential treatment of the so-called minorities.

By the method under which the determination of who could enter law school was handled, all of the objective standards could be and were set aside in favor of uncontrolled judgment by members of the Admissions Committee—some of whom were inexperienced and unqualified.

There was nothing in the system of student selection that assured equal treatment or equal protection of the laws to those who might offend the prejudices of the selection committee. But the system did have a built-in preferential treatment for four types of minorities, not all minorities, but only four, Blacks, Chicanos, Philippinos and American Indians.

The acceptance of the fact that one is Black as conclusive proof that he is entitled to special consideration in the determination of his eligibility without any further inquiry as to whether he is in fact the victim of economic depriva-

tion or educational disadvantage, is an impermissible discrimination against the White applicant who is displaced thereby.

The use of the term "culturally deprived" does not remove the taint of discrimination from the special privileges accorded to certain races. No cultural deprivation tests were in fact employed by the University in determining who should enter the law school. These minorities were specially admitted even though they may have been of middle class background, have professional parents or otherwise have had average or above average cultural opportunities.

If the reason that only Blacks, Chicanos, Philippinos and Indians are entitled to special privileges in law school admissions to the University not accorded to other races is because the court judicially knows that only they have been subjected to racial prejudice, then the court must judicially know that there are no racial prejudices against the people who find themselves described as "Gooks," "Dagos," "Wops," "Kikes," "Bohunks," "Squareheads," "Chinks," etc. as to whom special privileges have not been accorded.

The essence of the arguments of respondents and some of the *amici curiae* that Blacks should not be subjected to the same criteria as Whites is in effect an argument that there should be one law for Blacks and one law for Whites.

Such a principle has been repudiated by this court more than once. This court has indicated that equal protection is a pledge of equal laws. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 83 L.Ed. 208. The Equal Protection

Clause of the 14th Amendment is available to all citizens, not just to Blacks or so called minorities.

If, what respondents on page 10 of their brief call the "conventional mechanical credentializing system" does not always produce good indicators of the culturally separated or deprived individuals, we submit that it makes no difference whether they are Black or White. Since there is no inquiry as to whether the White is also culturally separated or deprived, there is no justification for using a different criterion for one merely because he is Black.

If there is something wrong with the system of credentializing, then it should be changed for *everyone*. The mere fact that DeFunis was White should not subject him to more stringent criteria for entry to the law school than he would have if he were Black.

Law is a learned profession and the objective of the law school should be to train students to qualify for that *highly competitive* profession with ability to practice with competence.

If we can pretend that those who fail to meet the minimum tests applicable generally for entrance into the law school are nevertheless as acceptable as those who do, and if it is intended regardless of how well they meet the criteria to give the so-called "minorities" a representation in the profession equal to their numbers in the population, we may as well accomplish that by allowing graduation regardless of low grades in law school and admitting them to the Bar without requiring passage of examination standards required of White applicants. The principle is exactly the same.

When the students who receive these special privileges are graduated, they will be held out to the public as being qualified to practice law. In the highly competitive field of law, qualification is not an *absolute* thing but a *relative* matter and in competition with those who do have an ability to do well in schooling and *learn the subjects properly*, those practitioners who obtain their admission to the profession by the pretense of qualifications they did not have will be poor representatives of their clients.

The argument that is made in respondents' brief that none of the minorities with the low scores were unqualified begs the question because, as respondents' brief states on page 4, the Chairman of the Admissions Committee stated in testimony that most all of the applicants for admission were qualified by admission standards of other comparable law schools in recent years.

All of the White students who were summarily rejected were also "qualified" if we disregard their qualifications *relative* to the applicants with the higher scores.

The preference of the less qualified over the better qualified merely because of color does violence to the right of persons to succeed on their own merits and denies the equal protection of the laws.

The issue which respondents undertake to inject into this case by their mention on page 37 of their brief of the contention which they made below that DeFunis would not have been admitted even if the Blacks had not been preferred, was not accepted by the Washington Supreme Court as affecting his standing to maintain this action, and the contention was unsound in any event because it was

not supported by the facts as found or shown by the evidence.

The placing of plaintiff so far down the waiting list was one of the causes for complaint in this action. Measured by any objective tests, plaintiff should have been within the 311 applicants who were offered admissions in September. Thus, out of 275 students who were offered admission in August, 180 had lower junior/senior grade point averages than plaintiff (Findings XX, A-52), but out of the 330 students who were considered for admission in September, 224 had lower junior/senior grade point averages than plaintiff (Findings XX, A-52), and this is using the law school's figures which omitted the nine hours of "A" earned in his junior year (Findings XX, A-52). The argument that plaintiff's quartile would not have been reached overlooks the fact that students on the waiting list were *not placed in quartiles in order of measurable standards*, such as their grade averages or predicted first-year averages, but on the basis of *arbitrary* selections made *without standards.*

Had plaintiff been considered on the basis of any objective standards which were applied eqully to all applicants, he would have been among the 311 invited to attend, whether we approach it from the standpoint of junior/senior grade averages, predicted first-year averages (PFYA) or law school aptitude tests (LSAT).

There was ample evidence to support the trial court's finding of fact that the admission of less qualified students resulted in a denial of placement of those better qualified (Findings 24, A-53), and that plaintiff had better qualifica-

tions than many of those admitted to the law school (Findings 25, A-53).

Since plaintiff would have accepted had he been on the list of 311 invitees, his exclusion from that list definitely excluded him from the school. There was ample evidence to sustain the court's finding which in effect held that plaintiff was crowded out by less qualified students.

Much of respondents' brief is concerned with philosophical discussions of matters not in the record purporting to prove the desirability of giving special privileges to the minority races that are denied to members of the majority race. Respondent would have the court take judicial notice of all sorts of things about the relationship of Blacks to the community.

The trouble with judicial notice of this kind, is that the court is being asked to judicially know a great many things that may or may not be true. Thus the empirical assumption is made that there is a necessity to have a higher percentage of Blacks in the law school. This is not based on anything in the Constitution or statutes nor do we know of any such public policy. Judicial knowledge is supposed to be confined to those things of which well-informed people in the community have knowledge. It does not extend to controversial and arguable matters.

If the court judicially knows that all Blacks are culturally deprived and come to the law school with lower academic preparation than all Whites, then the court is undertaking to judicially know that in Washington, where most of these Blacks went to the same public schools as the Whites, that they did not get equal lower school education. There is nothing in the record to substantiate this.

The extent to which preference on account of race was allowed to determine the admissions policy of the University of Washington in this case is shown by the fact that three members of the so-called "minority races" who had not even been on the waiting list at the time DeFunis was eliminated, were admitted later with almost incredibly low scores in all of the objective criteria used to determine qualification.

A reference to page 44 of the Single Appendix will show, for example, one of these who was admitted had a predicted first-year average of only 69.97 as compared to the cutoff figure of 75.4 for White students. This same student had a writing test figure of only 28, which was the lowest in the whole group considered. He had a law school aptitude test score of 392 compared to DeFunis' score of 668 (Findings 13, A-50), and a combined Junior/Senior grade point average of 3.21 out of a possible 4.00. The other two late entries had comparable low scores. A reference to Schedule A found in Single Appendix 37, will show that no White students were admitted with any such low scores.

That same exhibit on pages 44 and 45 of the Single Appendix will show that as of August 1, 1971, when DeFunis was eliminated, there were no minority students even on the waiting list. The quartiles on the waiting list were reserved for White students. There can be no question that DeFunis was not given the same consideration as was accorded to members of the so-called "minority" groups.

Some of the amici curiae take issue with the findings of the trial court to the effect that DeFunis was crowded out of the law school by the preferential admission policy given to the minorities.

In Washington findings of fact made by the trial court which are not modified by the appellate court are treated as verities for all purposes of this case. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183; *O'Brien v. Schultz*, 45 Wn.2d 769, 278 P.2d 322.

The findings of the Washington trial court have not been disturbed on appeal and are the conclusive facts in this case.

When the University law school was faced with having a greater number of applicants than the spaces available, various alternatives might have been followed to determine who should be admitted and who should be rejected.

For example, all qualified students might have been taken on a first-come, first-served basis or selection might have been made by lot or, those having the highest grade or test qualifications might have been preferred, or some formula of weighting might have been devised to judge students on the basis of some kind of examination or *uniform* standard.

The University elected to test the qualifications for White students on the basis of the records of their performance as students and their test scores. However, with regard to the so-called "minority students" it arbitrarily admitted them without requiring them to meet any of the objective tests for qualification. This was a *competitive* situation and the special privileges afforded the minority students meant the *elimination* of the White students who were better qualified.

The trial court found and the facts are that on the basis of race DeFunis was denied admission to the law school.

Whites do have the right to be protected by the laws against discrimination. Thus, in *Peterson v. Kiff*, 407 U.S. 493, 33 L.Ed.2d 83, it was a White who was held entitled to challenge the exclusion of certain races from a grand jury and in *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 34 L.Ed.2d 415, the challenge by a White to segregation was permitted.

When the applicants for the law school were segregated into two groups and the "so-called minorities" were judged on one basis and the Whites were judged on another, the University was practicing *segregation and discrimination.*

Some *amici curiae* are contending that the Equal Protection clause of the 14th Amendment is available only to Blacks. This has been quite well discredited by the frequent application of the 14th Amendment in all of its ramifications to every kind of claimant, including corporations. For example: *Smith v. Cahoon*, 283 U.S. 553, 75 L.Ed. 1264; *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 67 L.Ed. 1112; *Hines v. Davidowitz*, 312 U.S. 52, 85 L.Ed. 581; *Skinner v. Oklahoma*, 316 U.S. 535, 86 L.Ed. 1655; *Lewis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 73 L.Ed. 204; *Takahashi v. Fish & Game Commission*, 339 U.S. 410, 92 L.Ed. 1478.

There is no evidence in this case that the University of Washington had ever discriminated against the so-called "minority races" and this is not a case involving the framing of a remedy for past discrimination. There was no evidence of any such discrimination and respondents do not contend that the University ever discriminated.

The fact that most of the students at the University of Washington Law School in the past have been White, as

respondents point out in their brief, does not mean that there was discrimination against them or that they were segregated. The University has always had an "open door policy."

The predominance of Whites in the University law school may well be explained by a lack of inclination or aptitude on the part of the Blacks for such studies.

Any observant person knows that certain races have certain bents or inclinations. The fact that the heavyweight boxing field is dominated by Blacks does not prove that Whites are excluded by discrimination. Anyone who observes professional basketball will note that an exceptionally high percentage of the professional players are Black.

Does this mean that this is a segregated sport? Blacks have demonstrated their dominance in certain athletic endeavors. By the same logic as impells the preference of less qualified minorities to achieve racial balance in law, it might be argued that special treatment should be given Whites to achieve racial balance in athletics.

Violation Of the Federal Civil Rights Act Is An Issue Properly Before This Court

As pointed out in our opening brief, exclusion of DeFunis from participation in the benefits of the federally assisted University of Washington was a violation of Title 42 USC, §2000(d), part of the Federal Civil Rights Act.

This issue was raised and argued extensively in the brief presented to the Washington Supreme Court. It is not raised for the first time in this court. The brief filed in the Washington Supreme Court was included in the record that went to this court with the Petition for Certiorari.

Reference to the brief of the respondents before the Washington Supreme Court will show that a whole section of the brief was devoted to this issue, beginning on page 14 thereof. While the Washington Supreme Court elected to ignore that argument in its Opinion, as it did the argument relative to the violation of the Equal Rights and Immunities Clause of the Washington State Constitution, the matter was presented to it and was argued. When the matter was before the Washington Supreme Court, DeFunis was *respondent*, not appellant, and DeFunis was urging *affirmance* of the judgment of the Superior Court.

In any event the rule is well settled both in the Supreme Court of Washington and in this court, that a judgment of a court below may be *affirmed* on any ground that will support it regardless of whether or not the grounds for affirmance are the same as the theory of the lower court and *whether or not the particular ground was urged in the lower court.*

In *Helvering v. Gowran*, 302 U.S. 245, 82 L.Ed. 224, this court said, beginning on page 245:

> "Gowran contends here that the Government should not have been permitted by the Court of Appeals to argue its 'basis of zero' theory, because that theory raised an issue not pleaded, tried, argued or otherwise referred to in the proceedings before the Board. It is true that the theory was first presented by the Commissioner in the Court of Appeals. But it does not appear by the record that objection to the consideration of this theory was made below. . . . ". . . It is immaterial whether the commissioner proceeded upon the wrong theory. The burden is upon the petitioner to show that the assessment is wrong upon any proper theory; otherwise he must fail.'
>
> "In the review of judicial proceedings the rule is

> settled that if the decision below is correct, it must be affirmed, *although the lower court relied upon a wrong ground or gave a wrong reason.* Frey & Son v. Cudahy Packing Co., 256 U.S. 208, 65 L.ed. 892, 41 S.Ct. 451; *United States v. American R. Exp. Co.*, 265 U.S. 425, 68 L.ed. 1087, 44 S.Ct. 560; United States v. Holt State Bank, 270 U.S. 49, 56, 70 L.ed. 465, 469, 46 S.Ct. 197; Langnes v. Green, 282 U.S. 531, 75 L.ed. 520, 51 S.Ct. 243; Stelos Co. v. Hoisery Motor-Mend Corp., 295 U.S. 237, 239, 79 L.ed. 1414, 1416, 55 S.Ct. 746; cf. United States v. Williams, 278 U.S. 255, 73 L.ed. 314, 49 S.Ct. 97." (Emphasis supplied)

We are not seeking to *reverse* the decision of the superior court by this appeal and the rule that prevents raising a new issue for the first time on appeal does not bar asserting any theory *in support* of a decision. The distinction between raising new issues to affirm a decision and raising them to *reverse* a decision is well illustrated by what the Ninth Circuit Court of Appeals said in *Spokane County v. Air Base Housing, Inc.*, 304 F.2d 494. The court said on page 497:

> "Appellant asserts that this contention may not be urged here since this point was not presented or decided in the trial court. Appellee argues that the judgment may be affirmed upon a ground differing from that relied upon by the trial court. Reliance is upon the statement in *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224: 'In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.'...
>
> "...
>
> "The rule above quoted from *Helvering v. Gowran, supra,* is one generally recognized and one which has been often approved and restated in this court. Of

course this rule relates to *affirmance* on new grounds not relied upon in the trial court. There is no such general rule authorizing an appellate court to *reverse* on grounds other than those urged in the trial court.

To the same effect in Washington is *Curltiss v. Young Mens Christian Ass'n.*, 82 Wn.2d 455, 511 P.2d 991.

The issue of the violation by the University of the requirements of Title 42 USC, §2000(d) in DeFunis' case was properly before the Washington Supreme Court. It is properly before this court.

The exclusion of DeFunis from the law schol on the basis of race was a direct violation of that section.

This court in the recent case of *Lau v. Nichols*, decided January 21, 1974, Vol. 42, Law Week, 4165, says of Title 42 USC §2000(d):

> "That section bans discrimination based 'on the ground of race, color, or national origin,' in 'any program or activity receiving federal financial assistance.'"

The court in that case said:

> "By §602 of the Act HEW is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federal financed projects consistently with §601. Hew's regulations specify, 45 CFR §80.3(b)(1), that the recipients may not:
>
> " 'Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> " 'Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program';

"Discrimination among students on account of race or national origin that is prohibited includes 'discrimination in the availability or use of any academic . . . or other facilities of the grantee or other recipient.' Id., 80.5(b).

"Discrimination is barred which has that *effect* even though no purposeful design is present: a recipient 'may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination' or has 'the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.' Id., 80.3(b)(2)."

The court went on to say:

"The Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. *Oklahoma v. Civil Service Commission*, 330 U.S. 127, 142-143. Whatever may be the limits of that power *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 *et seq.*, they have not been reached here. Senator Humphrey, during the floor debates on the Civil Rights Act of 1964, said:

"'Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.'"

It will be noted that from the regulations quoted in the above decision, an institution which is receiving federal financial assistance may not provide any service or other benefit to an individual "which is *different* or is provided in a *different* manner from that provided to others under the program." (Our emphasis)

Requiring DeFunis and others like him to meet more stringent admission standards than those of the so-called "minority races" was providing the benefit *differently* to others than to him.

The decision of the Washington Trial Court should be reinstated in this case if for no other reason than that the civil rights of DeFunis as enunciated by the Federal Civil Rights Act in 42 USC §2000(d) were violated by his exclusion on account of race.

The Dissenting Opinion of Chief Justice Hale Was Well Grounded

Chief Justice Hale, after an unusually close scrutiny of the trial record in this case, wrote his dissenting opinion.

That dissenting opinion (despite criticism by Dean Roddis) is well grounded on the evidence.

Objection is made by respondents to his use of the information contained on the file jackets of the individual applicants. This information is highly relevant since it shows exactly what the considerations were that led to admission or rejection.

One cannot read the notations on the file jackets without knowing that many minority students were admitted with considerations of the so-called "other things" that not only did not indicate a superior likelihood of making a useful contribution to the school, but were the sort of things that would have disqualified a person had he been White, such as the notation: "Could make it if her personal situation could be worked out. Lighten load possibility. Admit." (Petition for Cert., A-47)

Another notation was "His recommendations are equivocal and his academic career unimpressive." (St. 394) Another one said: "Take a chance on his screwy personality and admit." (St. 396) Such relevant remarks are noted by Chief Justice Hale and amply support his dissenting opinion.

His recital of the facts in the dissenting opinion is not exaggerated.

We submit that Chief Justice Hale's remarks about the alternatives to the kind of discrimination that occurred against DeFunis are extremely well considered. We cannot do better in concluding this brief than quote from the last portion of the dissenting opinion (Pet. for Cert., A-54):

> "Are there methods by which a state owned and operated law school may be fairly and constitutionally administered so as to comport with the constitutions? Although the courts have neither the power nor the aptitude to operate a university and should be without the inclination to do so, several possible methods come to mind which prima facie, at least, meet the fairness and equal protection standards of the constitutions. One would be a system of comprehensive competitive examinations in predesignated courses, such as English, history, basic science, mathematics, economics and sociology, and with optional courses in other fields selected by the student.
>
> "Another method would be to work out a reasonably accurate mathematical correlation between grade values from different colleges or universities in preannounced prelaw course and to compute those equivalent grades with admission granted the 150 students with the highest grades. This gives every student a fair chance to achieve his ambition.
>
> "Another possible solution—in case the faculty believes that high prelaw grades should not be the main criterion—prescribe a sound but not extraordinarily high prelaw grade standard and make a random selection by lot and chance of the 275 applicants to be admitted from among those qualifying. And the fairest way of all—but I doubt its efficacy—admit all applicants possessing a minimum prerequisite grade point in prescribed courses, conduct the law classes in the field house or stadium, if necessary, give frequent examinations, and let the better qualified few survive on the basis of their grades in law school. There are,

of course, other methods equally fair and impartial which may be readily developed, all of which will meet the constitutional tests of fair and impartial application. *But whatever scheme is developed, one thing is certain: Keep it within the principles of the constitutions, no one can be preferred and no one can be disparaged because of race, color, creed, ethnic origin or domestic environment.*

"If it is the state policy—and I think it should be—to afford special training, guidance and coaching to those students whose domestic environment has deprived them of a fair chance to compete, or to provide financial assistance to students in economic straits, it is within the state's constitutional powers to do so, but once these students have reached the point of seeking admission to a professional or graduate school, no preference or partiality can or should, under the constitutions, be shown them.

"The rationale of *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D.Cal.1972), an opinion dated October 30, 1972, filed in the United States District Court, Northern District of California, I think, expresses the principles which should govern the *DeFunis* case. That court held unconstitutional a school district's plan to give preference in employment and promotions to members of ethnic minorities in administrative and supervisory positions, such as principals, assistant principals, deans and heads of departments—a plan designed to increase the numerical representation of ethnic minorities in the administration of the schools. That court, in holding the scheme unconstitutional, said that 'The key issue in this case is whether or not a classification which is based on race is valid,' and answered it with a statement of principles which ought to control here:

"Preferential treatment under the guise of 'affirmative action' is the imposition of one form of racial discrimination in place of another. The questions that must be asked in this regard are: must an individual sacrifice his right to be judged on his own merit by accepting discrimination based solely on

the color of his skin? How can we achieve the goal of equal opportunity for all if, in the process, we deny equal opportunity to some?

"Mr. DeFunis came before the bar of the Superior Court much as did petitioners, parents of school children, in *Brown v. Board of Education*, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954), asking that he not be denied admission to the university law school because of race or ethnic origin. The trial court properly ordered his admission. So, too, would I, and, therefore, I would affirm."

Respectfully submitted,

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DeFUNIS ET AL. *v.* ODEGAARD ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 73-235. Argued February 26, 1974—Decided April 23, 1974

After being denied admission to a state-operated law school, petitioner brought this suit on behalf of himself alone for injunctive relief, claiming that the school's admissions policy racially discriminated against him in violation of the Equal Protection Clause of the Fourteenth Amendment. The trial court agreed and ordered the school to admit him in the fall of 1971. The Washington Supreme Court reversed, holding that the school's admissions policy was not unconstitutional. MR. JUSTICE DOUGLAS, as Circuit Justice, stayed that judgment pending this Court's final disposition of the case, with the result that petitioner was in his final school year when this Court considered his petition for certiorari. After oral argument, the Court was informed that petitioner had registered for his final quarter. Respondents have assured the Court that this registration is fully effective regardless of the ultimate disposition of the case. *Held:* Because petitioner will complete law school at the end of the term for which he has registered regardless of any decision this Court might reach on the merits, the Court cannot, consistently with the limitations of Art. III of the Constitution, consider the substantive constitutional issues, and the case is moot.

(a) Mootness here does not depend upon a "voluntary cessation" of the school's admissions practices but upon the simple fact that petitioner is in his final term, and the school's fixed policy to permit him to complete the term.

(b) The case presents no question that is "capable of repetition, yet evading review," since petitioner will never again have to go through the school's admissions process, and since it does not follow that the issue petitioner raises will in the future evade review merely because this case did not reach the Court until the eve of petitioner's graduation.

82 Wash. 2d 11, 507 P. 2d 1169, vacated and remanded.

Josef Diamond argued the cause for petitioners. With him on the briefs was *Lyle L. Iversen.*

Slade Gorton, Attorney General of Washington, argued the cause for respondents. With him on the brief was *James B. Wilson*, Senior Assistant Attorney General.*

*Briefs of *amici curiae* urging reversal were filed by *Milton A. Smith, Gerard C. Smetana*, and *Jerry Kronenberg* for the Chamber of Commerce of the United States; by *J. Albert Woll, Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *Theodore R. Mann* for the American Jewish Congress; by *David I. Caplan* for the Jewish Rights Council; by *Anthony J. Fornelli, Thaddeus L. Kowalski*, and *Samuel Rabinove* for the Advocate Society et al.; by *Alexander M. Bickel, Philip B. Kurland, Larry M. Lavinsky*, and *Arnold Forster* for the Anti-Defamation League of B'nai B'rith; and by *Sanford Jay Rosen, Herbert Teitelbaum*, and *Melvin L. Wulf* for the Mexican American Legal Defense and Educational Fund et al.

Briefs of *amici curiae* urging affirmance were filed by *William J. Brown*, Attorney General, and *Andrew J. Ruzicho, Earl M. Manz*, and *Stephen J. Simmons*, Assistant Attorneys General, for the State of Ohio; by *John P. Harris* for the city of Seattle; by *Fletcher N. Baldwin, Jr.*, and *Chesterfield Smith* for the American Bar Assn.; by *Archibald Cox, James N. Bierman, James A. Sharaf*, and *Daniel Steiner* for the President and Fellows of Harvard College; by *J. Harold Flannery* for the Center for Law and Education, Harvard University; by *Frank Askin* and *Norman Amaker* for the Board of Governors of Rutgers, the State University of New Jersey, et al.; by *Edgar S. Cahn* and *Jean Camper Cahn* for the Deans of the Antioch School of Law; by *Erwin N. Griswold* and *Clifford C. Alloway* for the Association of American Law Schools; by *John Holt Myers* for the Association of American Medical Colleges; by *Howard A. Glickstein* for a Group of Law School Deans; by *Harry B. Reese* and *Peter Martin* for the Law School Admission Council; by *Cruz Reynoso* and *Robert B. McKay* for the Council on Legal Education Opportunity; by *Roswell B. Perkins, Kenneth C. Bass III, David S. Tatel*, and *R. Stephen Browning* for the Lawyers' Committee for Civil Rights Under Law; by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Jeffry A. Mintz, Louis H. Pollak*, and *John Baker* for the NAACP Legal Defense and Educational Fund, Inc.; by *Derrick A. Bell, Jr.*, for the National Conference of Black Lawyers; by *Bruce R. Greene* and *Herbert Becker* for the American Indian Law Students Assn., Inc., et al.; by *Clifford Sweet, C. Lyonel*

PER CURIAM.

In 1971 the petitioner Marco DeFunis, Jr.,[1] applied for admission as a first-year student at the University of Washington Law School, a state-operated institution. The size of the incoming first-year class was to be limited to 150 persons, and the Law School received some 1,600 applications for these 150 places. DeFunis was eventually notified that he had been denied admission. He thereupon commenced this suit in a Washington trial court, contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DeFunis brought the suit on behalf of himself alone, and not as the representative of any class, against the various respondents, who are officers, faculty members, and members of the Board of Regents of the University of Washington. He asked the trial court to issue a mandatory injunction commanding the respondents to admit him as a member of the first-year class entering in September 1971, on the ground that the Law School admissions policy had resulted in the unconstitutional denial of his application for admission. The trial court agreed with his claim and granted the requested relief.

Jones, Dennis R. Yeager, E. Richard Larson, Nathaniel R. Jones, Michael H. Terry, Joseph A. Matera, and *C. Christopher Brown* for the Legal Aid Society of Alameda County et al.; by *Peter Van N. Lockwood, David Bonderman, Sylvia Roberts,* and *David Rubin* for the National Organization for Women Legal Defense and Education Fund, Inc., et al.; and by *Joseph L. Rauh, Jr.,* for the National Council of Jewish Women et al.

[1] Also included as petitioners are DeFunis' parents and his wife. Hereafter, the singular form "petitioner" is used.

DeFunis was, accordingly, admitted to the Law School and began his legal studies there in the fall of 1971. On appeal, the Washington Supreme Court reversed the judgment of the trial court and held that the Law School admissions policy did not violate the Constitution. By this time DeFunis was in his second year at the Law School.

He then petitioned this Court for a writ of certiorari, and MR. JUSTICE DOUGLAS, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the "final disposition of the case by this Court." By virtue of this stay, DeFunis has remained in law school, and was in the first term of his third and final year when this Court first considered his certiorari petition in the fall of 1973. Because of our concern that DeFunis' third-year standing in the Law School might have rendered this case moot, we requested the parties to brief the question of mootness before we acted on the petition. In response, both sides contended that the case was not moot. The respondents indicated that, if the decision of the Washington Supreme Court were permitted to stand, the petitioner could complete the term for which he was then enrolled but would have to apply to the faculty for permission to continue in the school before he could register for another term.[2]

We granted the petition for certiorari on November 19, 1973. 414 U. S. 1038. The case was in due course orally argued on February 26, 1974.

In response to questions raised from the bench during the oral argument, counsel for the petitioner has informed the Court that DeFunis has now registered "for his final

[2] By contrast, in their response to the petition for certiorari, the respondents had stated that DeFunis "will complete his third year [of law school] and be awarded his J. D. degree at the end of the 1973–74 academic year regardless of the outcome of this appeal."

quarter in law school." Counsel for the respondents have made clear that the Law School will not in any way seek to abrogate this registration.[3] In light of DeFunis' recent registration for the last quarter of his final law school year, and the Law School's assurance that his registration is fully effective, the insistent question again arises whether this case is not moot, and to that question we now turn.

The starting point for analysis is the familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244 246 (1971). The inability of the federal judiciary "to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy." *Liner* v. *Jafco, Inc.*, 375 U. S. 301, 306 n. 3 (1964); see also *Powell* v. *McCormack*, 395 U. S. 486, 496 n. 7 (1969); *Sibron* v. *New York*, 392 U. S. 40, 50 n. 8 (1968). Although as a matter of Washington state law it appears that this case would be saved from mootness by "the great public interest in the continuing issues raised by this appeal," 82 Wash. 2d 11, 23 n. 6, 507 P. 2d 1169, 1177 n. 6 (1973), the fact remains that under Art. III "[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *North Carolina* v. *Rice*, *supra*, at 246.

The respondents have represented that, without regard to the ultimate resolution of the issues in this case,

[3] In their memorandum on the question of mootness, counsel for the respondents unequivocally stated: "If Mr. DeFunis registers for the spring quarter under the existing order of this court during the registration period from February 20, 1974, to March 1, 1974, that registration would not be canceled unilaterally by the university regardless of the outcome of this litigation."

DeFunis will remain a student in the Law School for the duration of any term in which he has already enrolled. Since he has now registered for his final term, it is evident that he will be given an opportunity to complete all academic and other requirements for graduation, and, if he does so, will receive his diploma regardless of any decision this Court might reach on the merits of this case. In short, all parties agree that DeFunis is now entitled to complete his legal studies at the University of Washington and to receive his degree from that institution. A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel that result, and could not serve to prevent it. DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be "definite and concrete" and no longer "touch[es] the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241 (1937).

It matters not that these circumstances partially stem from a policy decision on the part of the respondent Law School authorities. The respondents, through their counsel, the Attorney General of the State, have professionally represented that in no event will the status of DeFunis now be affected by any view this Court might express on the merits of this controversy. And it has been the settled practice of the Court, in contexts no less significant, fully to accept representations such as these as parameters for decision. See *Gerende* v. *Election Board,* 341 U. S. 56 (1951); *Whitehill* v. *Elkins,* 389 U. S. 54, 57–58 (1967); *Ehlert* v. *United States,* 402 U. S. 99,

107 (1971); cf. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 162–163 (1971).

There is a line of decisions in this Court standing for the proposition that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308–310 (1897); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944); *Gray* v. *Sanders*, 372 U. S. 368, 376 (1963); *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 202–203 (1968). These decisions and the doctrine they reflect would be quite relevant if the question of mootness here had arisen by reason of a unilateral change in the *admissions procedures* of the Law School. For it was the admissions procedures that were the target of this litigation, and a voluntary cessation of the admissions practices complained of could make this case moot only if it could be said with assurance "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co.*, *supra*, at 633. Otherwise, "[t]he defendant is free to return to his old ways," *id.*, at 632, and this fact would be enough to prevent mootness because of the "public interest in having the legality of the practices settled." *Ibid.* But mootness in the present case depends not at all upon a "voluntary cessation" of the admissions practices that were the subject of this litigation. It depends, instead, upon the simple fact that DeFunis is now in the final quarter of the final year of his course of study, and the settled and unchallenged policy of the Law School to permit him to complete the term for which he is now enrolled.

It might also be suggested that this case presents a question that is "capable of repetition, yet evading

review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911); *Roe* v. *Wade*, 410 U. S. 113, 125 (1973), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But DeFunis will never again be required to run the gantlet of the Law School's admission process, and so the question is certainly not "capable of repetition" so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged,[4] there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from "[t]he usual rule in federal cases . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." *Roe* v. *Wade*, *supra*, at 125; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Because the petitioner will complete his law school studies at the end of the term for which he has now registered regardless of any decision this Court might reach on the merits of this litigation, we conclude that the Court cannot, consistently with the limitations of

[4] In response to an inquiry from the Court, counsel for the respondents has advised that some changes have been made in the admissions procedures "for the applicants seeking admission to the University of Washington law school for the academic year commencing September, 1974." The respondents' counsel states, however, that "[these] changes do not affect the policy challenged by the petitioners . . . in that . . . special consideration still is given to applicants from 'certain ethnic groups.'"

Art. III of the Constitution, consider the substantive constitutional issues tendered by the parties.[6] Accordingly, the judgment of the Supreme Court of Washington is vacated, and the cause is remanded for such proceedings as by that Court may be deemed appropriate.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE BRENNAN that this case is not moot, and because of the significance of the issues raised I think it is important to reach the merits.

I

The University of Washington Law School received 1,601 applications for admission to its first-year class beginning in September 1971. There were spaces available for only about 150 students, but in order to enroll this number the school eventually offered admission to 275 applicants. All applicants were put into two groups, one of which was considered under the minority admissions program. Thirty-seven of those offered admission had indicated on an optional question on their application that their "dominant" ethnic origin was either Black, Chicano, American Indian, or Filipino, the four groups included in the minority admissions program. Answers to this optional question were apparently the sole basis

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[6] It is suggested in dissent that "[a]ny number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term." *Post*, at 348. "But such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide," *Hall* v. *Beals*, 396 U. S. 45, 49 (1969), in the absence of "evidence that this is a prospect of 'immediacy and reality.'" *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941).

upon which eligibility for the program was determined. Eighteen of these 37 actually enrolled in the Law School.

In general, the admissions process proceeded as follows: An index called the Predicted First Year Average (Average) was calculated for each applicant on the basis of a formula combining the applicant's score on the Law School Admission Test (LSAT) and his grades in his last two years in college.[1] On the basis of its experience with previous years' applications, the admissions committee, consisting of faculty, administration, and students, concluded that the most outstanding applicants were those with averages above 77; the highest average of any applicant was 81. Applicants with averages above 77 were considered as their applications arrived by random distribution of their files to the members of the committee who would read them and report their recommendations back to the committee. As a result of the first three committee meetings in February, March, and April 1971, 78 applicants from this group were admitted, although virtually no other applicants were offered admission this early.[2] By the final conclusion of

[1] The grades are calculated on a conventional 4.0 scale, and the LSAT is scored on a scale ranging from 200 to 800. A Writing Test given on the same day as the LSAT and administered with it is also included in the formula; it is scored on a scale of 20 to 80. The Admissions Committee combines these scores into the Average by calculating the sum of 51.3, 3.4751 × the grade-point average, .0159 × LSAT score, and .0456 × the Writing Test score. App. 24. For a brief discussion of the use of the LSAT in combination with undergraduate grades to predict law school success, see Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968).

[2] The only other substantial group admitted at this point were 19 "military" applicants. These were students who had previously been admitted to the school but who had either been unable to come, or forced to leave during their tenure, because of the draft. They were

the admissions process in August 1971, 147 applicants with averages above 77 had been admitted, including all applicants with averages above 78, and 93 of 105 applicants with averages between 77 and 78.

Also beginning early in the admissions process was the culling out of applicants with averages below 74.5. These were reviewed by the Chairman of the Admissions Committee, who had the authority to reject them summarily without further consideration by the rest of the Committee. A small number of these applications were saved by the Chairman for committee consideration on the basis of information in the file indicating greater promise than suggested by the Average. Finally during the early months the Committee accumulated the applications of those with averages between 74.5 and 77 to be considered at a later time when most of the applications had been received and thus could be compared with one another. Since DeFunis' average was 76.23, he was in this middle group.

Beginning in their May meeting the Committee considered this middle group of applicants, whose folders had been randomly distributed to Committee members for their recommendations to the Committee. Also considered at this time were remaining applicants with averages below 74.5 who had not been summarily rejected, and some of those with averages above 77 who had not been summarily admitted, but instead held for further consideration. Each Committee member would consider the applications competitively, following rough guide-

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given preferential treatment upon reapplication after completing their military obligation. Since neither party has raised any issue concerning this group of applicants, the remaining consideration of the admissions procedure will not discuss them. Four minority applicants were also admitted at this time, although none apparently had scores above 77. App. 31. Their admission was presumably pursuant to the procedure for minority applicants described below.

lines as to the proportion who could be offered admission. After the Committee had extended offers of admission to somewhat over 200 applicants, a waiting list was constructed in the same fashion, and was divided into four groups ranked by the Committee's assessment of their applications. DeFunis was on this waiting list, but was ranked in the lowest quarter. He was ultimately told in August 1971 that there would be no room for him.

Applicants who had indicated on their application forms that they were either Black, Chicano, American Indian, or Filipino were treated differently in several respects. Whatever their averages, none were given to the Committee Chairman for consideration of summary rejection, nor were they distributed randomly among committee members for consideration along with the other applications. Instead, all applications of Black students were assigned separately to two particular Committee members: a first-year Black law student on the Committee, and a professor on the Committee who had worked the previous summer in a special program for disadvantaged college students considering application to Law School.[3] Applications from among the other three minority groups were assigned to an assistant dean who was on the Committee. The minority applications, while considered competitively with one another, were never directly compared to the remaining applications, either by the subcommittee or by the full Committee. As in the admissions process generally, the Committee sought to find "within the minority category, those persons who we thought had the highest probability of

[3] This was a Council on Legal Education Opportunities program, federally funded by the Office of Economic Opportunity and sponsored by the American Bar Association, the Association of American Law Schools, the National Bar Association, and the Law School Admissions Council.

succeeding in Law School." [4] In reviewing the minority applications, the Committee attached less weight to the Average "in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school." 82 Wash. 2d 11, 21, 507 P. 2d 1169, 1175. In its publicly distributed Guide to Applicants, the Committee explained that "[a]n applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." [5]

Thirty-seven minority applicants were admitted under this procedure. Of these, 36 had Averages below DeFunis' 76.23, and 30 had averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman. There were also 48 nonminority applicants admitted who had Averages below DeFunis. Twenty-three of these were returning veterans, see n. 2, *supra*, and 25 others presumably admitted because of other factors in

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[4] Testimony of the Chairman of the Admissions Committee, Statement of Facts 353.

[5] The Guide to Applicants explained:

"We gauged the potential for outstanding performance in law school not only from the existence of high test scores and grade point averages, but also from careful analysis of recommendations, the quality of work in difficult analytical seminars, courses, and writing programs, the academic standards of the school attended by the applicant, the applicant's graduate work (if any), and the nature of the applicant's employment (if any), since graduation.

"An applicant's ability to make significant contributions to law school classes and the community at large was assessed from such factors as his extracurricular and community activities, employment, and general background.

"We gave no preference to, but did not discriminate against, either Washington residents or women in making our determinations. An applicant's racial or ethnic background was considered as one factor in our general attempt to convert formal credentials into realistic predictions." 82 Wash. 2d 11, 18–19, 507 P. 2d 1169, 1174.

their applications making them attractive candidates despite their relatively low averages.

It is reasonable to conclude from the above facts that while other factors were considered by the Committee, and were on occasion crucial, the Average was for most applicants a heavily weighted factor, and was at the extremes virtually dispositive.[6] A different balance was apparently struck, however, with regard to the minority applicants. Indeed, at oral argument, the Law School advised us that were the minority applicants considered under the same procedure as was generally used, none of those who eventually enrolled at the Law School would have been admitted.

The educational policy choices confronting a university admissions committee are not ordinarily a subject for judicial oversight; clearly it is not for us but for the law school to decide which tests to employ, how heavily to weigh recommendations from professors or undergraduate grades, and what level of achievement on the chosen criteria are sufficient to demonstrate that the candidate is qualified for admission. What places this case in a special category is the fact that the school did not choose one set of criteria but two, and then determined which to apply to a given applicant on the basis of his race. The

[6] The respondents provided the following table in response to an interrogatory during the proceedings in the state court:

Predicted First Year Averages	Number of Applications Received	Number Accepted
81	1	1
80	2	2
79	11	11
78	42	42
77	105	93
76	169	53
75	210	22

App. 34.

Committee adopted this policy in order to achieve "a reasonable representation" of minority groups in the Law School. 82 Wash. 2d, at 20, 507 P. 2d, at 1175. Although it may be speculated that the Committee sought to rectify what it perceived to be cultural or racial biases in the LSAT or in the candidates' undergraduate records, the record in this case is devoid of any evidence of such bias, and the school has not sought to justify its procedures on this basis.

Although testifying that "[w]e do not have a quota . . ." the Law School dean explained that "[w]e want a reasonable representation. We will go down to reach it if we can," without "taking people who are unqualified in an absolute sense . . . ." (Statement of Facts 420.) By "unqualified in an absolute sense" the dean meant candidates who "have no reasonable probable likelihood of having a chance of succeeding in the study of law . . . ." (*Ibid.*) But the dean conceded that in "reaching," the school does take "some minority students who at least, viewed as a group, have a less such likelihood than the majority student group taken as a whole." (*Id.*, at 423.)

> "Q. Of those who have made application to go to the law school, I am saying you are not taking the best qualified?
>
> "A. In total?
>
> "Q. In total.
>
> "A. In using that definition, yes." (*Id.*, at 423–424.)

It thus appears that by the Committee's own assessment, it admitted minority students who, by the tests given, seemed less qualified than some white students who were not accepted, in order to achieve a "reasonable representation." In this regard it may be pointed out that for the year 1969–1970—the year before the class to which DeFunis was seeking admission—the Law School

reported an enrollment of eight Black students out of a total of 356.[7] (Defendants' Ex. 7.) That percentage, approximately 2.2%, compares to a percentage of Blacks in the population of Washington of approximately 2.1%.[8]

II

There was a time when law schools could follow the advice of Wigmore, who believed that "the way to find out whether a boy has the makings of a competent lawyer is to see what he can do in a first year of law studies." Wigmore, Juristic Psychopoyemetrology—Or, How to Find Out Whether a Boy Has the Makings of a Lawyer, 24 Ill. L. Rev. 454, 463–464 (1929). In those days there were enough spaces to admit every applicant who met minimal credentials, and they all could be given the opportunity to prove themselves at law school. But by the 1920's many law schools found that they could not admit all minimally qualified applicants, and some selection process began.[9] The pressure to use some kind of admissions test mounted, and a number of schools instituted them. One early precursor to the modern day LSAT was the Ferson-Stoddard Law Aptitude examination. Wigmore conducted his own study of that test with 50 student volunteers, and concluded that it "had no substantial practical value." *Id.*, at 463. But his conclusions were not accepted, and the harried law

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[7] Although there is apparently no evidence in point in the record, respondents suggest that at least some of these eight students were also admitted on a preferential basis. Brief for Respondents 40 n. 27.

[8] United States Bureau of the Census, Census of Population: 1970, General Population Characteristics, Washington, Final Report PC (1)—B49, Table 18.

[9] For a history of gradual acceptance among law schools of standardized tests as an admission tool, see Ramsey, Law School Admissions: Science, Art, or Hunch?, 12 J. Legal Ed. 503 (1960).

schools still sought some kind of admissions test which would simplify the process of judging applicants, and in 1948 the LSAT was born. It has been with us ever since.[10]

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding. "It is obvious from the nature of the tests that they do not give the candidate a significant opportunity to express himself. If he is subtle in his choice of answers it will go against him; and yet there is no other way for him to show any individuality. If he is strong-minded, nonconformist, unusual, original, or creative—as so many of the truly important people are—he must stifle his impulses and conform as best he can to the norms that the multiple-choice testers set up in their unimaginative, scientific way. The more profoundly gifted the candidate is, the more his resentment will rise against the mental strait jacket into which the testers would force his mind." B. Hoffmann, The Tyranny of Testing 91–92 (1962).

Those who make the tests and the law schools which use them point, of course, to the high correlations between the test scores and the grades at law school the first year. *E. g.*, Winterbottom, Comments on "A Study of the Criteria for Legal Education and Admission to the

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[10] For a survey of the use of the LSAT by American law schools as of 1965, see Lunneborg & Radford, The LSAT: A Survey of Actual Practice, 18 J. Legal Ed. 313 (1966).

Bar," An Article by Dr. Thomas M. Goolsby, Jr., 21 J. Legal Ed. 75 (1968). Certainly the tests do seem to do better than chance. But they do not have the value that their deceptively precise scoring system suggests. The proponents' own data show that, for example, most of those scoring in the bottom 20% on the test do better than that in law school—indeed six of every 100 of them will be in the *top* 20% of their law school class. *Id.*, at 79. And no one knows how many of those who were not admitted because of their test scores would in fact have done well were they given the chance. There are many relevant factors, such as motivation, cultural backgrounds of specific minorities that the test cannot measure, and they inevitably must impair its value as a predictor.[11] Of course, the law school that admits only those with the highest test scores finds that on the average they do much better, and thus the test is a convenient tool for the admissions committee. The price is paid by the able student who for unknown reasons did not achieve that high score—perhaps even the minority with a different cultural background. Some tests, at least in the past, have been aimed at eliminating Jews.

The school can safely conclude that the applicant with a score of 750 should be admitted before one with a score of 500. The problem is that in many cases the choice will be between 643 and 602 or 574 and 528. The numbers create an illusion of difference tending to overwhelm other factors. "The wiser testers are well aware of the defects of the multiple-choice format and the danger of placing reliance on any one method of assessment to the exclusion of all others. What is distressing is how little their caveats have impressed the people who succumb to the propaganda of the test-

[11] Rock, Motivation, Moderators, and Test Bias, 1970 U. Tol. L. Rev. 527, 535.

makers and use these tests mechanically as though they were a valid substitute for judgment." Hoffmann, *supra*, at 215.

Of course, the tests are not the only thing considered; here they were combined with the prelaw grades to produce a new number called the Average. The grades have their own problems; one school's A is another school's C. And even to the extent that this formula predicts law school grades, its value is limited. The law student with lower grades may in the long pull of a legal career surpass those at the top of the class. "[L]aw school admissions criteria have operated within a hermetically sealed system; it is now beginning to leak. The traditional combination of LSAT and GPA [undergraduate grade point average] may have provided acceptable predictors of likely performance in law school in the past. . . . [But] [t]here is no clear evidence that the LSAT and GPA provide particularly good evaluators of the intrinsic or enriched ability of an individual to perform as a law student or lawyer in a functioning society undergoing change. Nor is there any clear evidence that grades and other evaluators of law school performance, and the bar examination, are particularly good predicators of competence or success as a lawyer." Rosen, Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria, 1970 U. Tol. L. Rev. 321, 332–333.

But, by whatever techniques, the law school must make choices. Neither party has challenged the validity of the Average employed here as an admissions tool, and therefore consideration of its possible deficiencies is not presented as an issue. The Law School presented no evidence to show that adjustments in the process employed were used in order validly to compare applicants of different races; instead, it chose to avoid making such comparisons. Finally,

although the Committee did consider other information in the files of all applicants, the Law School has made no effort to show that it was because of these additional factors that it admitted minority applicants who would otherwise have been rejected. To the contrary, the school appears to have conceded that by its own assessment—taking all factors into account—it admitted minority applicants who would have been rejected had they been white. We have no choice but to evaluate the Law School's case as it has been made.

III

The Equal Protection Clause did not enact a requirement that Law Schools employ as the sole criterion for admissions a formula based upon the LSAT and undergraduate grades, nor does it prohibit law schools from evaluating an applicant's prior achievements in light of the barriers that he had to overcome. A Black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. That applicant would not be offered admission because he is Black, but because as an individual he has shown he has the potential, while the Harvard man may have taken less advantage of the vastly superior opportunities offered him. Because of the weight of the prior handicaps, that Black applicant may not realize his full potential in the first year of law school, or even in the full three years, but in the long pull of a legal career his achievements may far outstrip those of his classmates whose earlier records appeared superior by conventional criteria. There is currently no test available to the Admissions

Committee that can predict such possibilities with assurance, but the Committee may nevertheless seek to gauge it as best it can, and weigh this factor in its decisions. Such a policy would not be limited to Blacks, or Chicanos or Filipinos, or American Indians, although undoubtedly groups such as these may in practice be the principal beneficiaries of it. But a poor Appalachian white, or a second generation Chinese in San Francisco, or some other American whose lineage is so diverse as to defy ethnic labels, may demonstrate similar potential and thus be accorded favorable consideration by the committee.

The difference between such a policy and the one presented by this case is that the Committee would be making decisions on the basis of individual attributes, rather than according a preference solely on the basis of race. To be sure, the racial preference here was not absolute—the Committee did not admit all applicants from the four favored groups. But it did accord all such applicants a preference by applying, to an extent not precisely ascertainable from the record, different standards by which to judge their applications, with the result that the Committee admitted minority applicants who, in the school's own judgment, were less promising than other applicants who were rejected. Furthermore, it is apparent that because the Admissions Committee compared minority applicants only with one another, it was necessary to reserve some proportion of the class for them, even if at the outset a precise number of places were not set aside.[12] That proportion, apparently 15% to

[12] At the outset the Committee may have chosen only a range, with the precise number to be determined later in the process as the total number of minority applicants, and some tentative assessment of their quality, could be determined. This appears to be the current articulated policy, see Appendix § 6, and we are advised by the respondents that § 6 "represents a more formal statement of the policy which was in effect in 1971 . . . but does not represent

20%, was chosen because the school determined it to be "reasonable," [15] although no explanation is provided as to how that number rather than some other was found appropriate. Without becoming embroiled in a semantic debate over whether this practice constitutes a "quota," it is clear that, given the limitation on the total number of applicants who could be accepted, this policy did reduce the total number of places for which DeFunis could compete—solely on account of his race. Thus, as the Washington Supreme Court concluded, whatever label one wishes to apply to it, "the minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." 82 Wash. 2d, at 32, 507 P. 2d, at 1182. A finding that the state school employed a racial classification in selecting its students subjects it to the strictest scrutiny under the Equal Protection Clause.

The consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination, *Anderson* v. *Martin*, 375 U. S. 399, 402; *Loving* v. *Virginia*, 388 U. S. 1, 10; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 668. Once race is a starting point educators and courts are immediately embroiled in competing claims of different racial and ethnic groups that would make difficult, manageable standards consistent

any change in policy." Letter to the Court dated March 19, 1974, p. 1. The fact that the Committee did not set a precise number in advance is obviously irrelevant to the legal analysis. Nor does it matter that there is some minimal level of achievement below which the Committee would not reach in order to achieve its stated goal as to the proportion of the class reserved for minority groups, so long as the Committee was willing, in order to achieve that goal, to admit minority applicants who, in the Committee's own judgment, were less qualified than other rejected applicants and who would not otherwise have been admitted.

[15] See n. 12, *supra*, and Appendix § 6.

with the Equal Protection Clause. "The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Loving, supra*, at 10. The Law School's admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogeneous society are taken into account. The reason is that professional persons, particularly lawyers, are not selected for life in a computerized society. The Indian who walks to the beat of Chief Seattle of the Muckleshoot Tribe in Washington [14] has a different culture from examiners at law schools.

The key to the problem is the consideration of each application *in a racially neutral way*. Since LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. Many Eskimos, American Indians, Filipinos, Chicanos, Asian Indians, Burmese, and Africans come from such disparate backgrounds that a test sensitively tuned for most applicants would be wide of the mark for many minorities.

The melting pot is not designed to homogenize people, making them uniform in consistency. The melting pot as I understand it is a figure of speech that depicts the wide diversities tolerated by the First Amendment under one flag. See 2 S. Morison & H. Commager, The Growth of the American Republic, c. VIII (4th ed. 1950). Minorities in our midst who are to serve actively in our public affairs should be chosen on talent and character alone, not on cultural orientation or leanings.

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[14] Uncommon Controversy, Report Prepared for American Friends Service Committee 29–30 (1970).

I do know, coming as I do from Indian country in Washington, that many of the young Indians know little about Adam Smith or Karl Marx but are deeply imbued with the spirit and philosophy of Chief Robert B. Jim of the Yakimas, Chief Seattle of the Muckleshoots, and Chief Joseph of the Nez Perce which offer competitive attitudes towards life, fellow man, and nature.[15]

I do not know the extent to which Blacks in this country are imbued with ideas of African Socialism.[16] Leopold Senghor and Sékou Touré, most articulate of African leaders, have held that modern African political philosophy is not oriented either to Marxism or to capitalism.[17] How far the reintroduction into educational curricula of ancient African art and history has reached the minds of young Afro-Americans I do not know. But at least as respects Indians, Blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

Insofar as LSAT tests reflect the dimensions and orientation of the Organization Man they do a disservice to minorities. I personally know that admissions tests were once used to eliminate Jews. How many other minorities they aim at I do not know. My reaction is that the presence of an LSAT test is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials.

The merits of the present controversy cannot in my view be resolved on this record. A trial would

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[15] See C. Fee, Chief Joseph, The Biography of a Great Indian (1936).

[16] See F. Brockway, African Socialism (1963); African Socialism (W. Friedland & C. Rosberg ed. 1964).

[17] See L. Senghor, On African Socialism (M. Cook ed. 1964).

involve the disclosure of hidden prejudices, if any, against certain minorities and the manner in which substitute measurements of one's talents and character were employed in the conventional tests. I could agree with the majority of the Washington Supreme Court only if, on the record, it could be said that the Law School's selection was racially neutral. The case, in my view, should be remanded for a new trial to consider, *inter alia*, whether the established LSAT tests should be eliminated so far as racial minorities are concerned.

This does not mean that a separate LSAT test must be designed for minority racial groups, although that might be a possibility. The reason for the separate treatment of minorities as a class is to make more certain that racial factors do not militate *against an applicant or on his behalf*.[15]

There is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of Blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race.

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[15] We are not faced here with a situation where barriers are overtly or covertly put in the path of members of one racial group which are not required by others. There was also no showing that the purpose of the school's policy was to eliminate arbitrary and irrelevant barriers to entry by certain racial groups into the legal profession groups. *Griggs* v. *Duke Power Co.*, 401 U. S. 424. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16, we stated that as a matter of educational policy school authorities could, within their broad discretion, specify that each school within its district have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole, in order to disestablish a dual school system. But there is a crucial difference between the policy suggested in *Swann* and that under consideration here: the *Swann* policy would impinge on no person's constitutional rights, because no one would be excluded from a public school and no one has a right to attend a segregated public school.

There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.

The slate is not entirely clean. First, we have held that *pro rata* representation of the races is not required either on juries, see *Cassell* v. *Texas*, 339 U. S. 282, 286–287, or in public schools, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24. Moreover, in *Hughes* v. *Superior Court*, 339 U. S. 460, we reviewed the contempt convictions of pickets who sought by their demonstration to force an employer to prefer Negroes to whites in his hiring of clerks, in order to ensure that 50% of the employees were Negro. In finding that California could constitutionally enjoin the picketing there involved we quoted from the opinion of the California Supreme Court, which noted that the pickets would "'make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis.'" *Id.*, at 463–464. We then noted that

> "[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the

numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Id.*, at 464.

The reservation of a proportion of the law school class for members of selected minority groups is fraught with similar dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to Blacks, or to Blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled *Sweatt* v. *Painter*, 339 U. S. 629, and allowed imposition of a "zero" allocation.[19] But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the

[19] *Sweatt* held that a State could not justify denying a black admission to its regular law school by creating a new law school for blacks. We held that the new law school did not meet the requirements of "equality" set forth in *Plessy* v. *Ferguson*, 163 U. S. 537. The student, we said, was entitled to "legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State." 339 U. S. 629, 635.

Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Terrace* v. *Thompson*, 263 U. S. 197; *Oyama* v. *California*, 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of *Korematsu* v. *United States*, 323 U. S. 214 (1944), and *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), involving curfews and relocations imposed upon Japanese-Americans.[20]

[20] Those cases involved an exercise of the war power, a great leveler of other rights. Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided *Korematsu* we also decided *Ex parte Endo*, 323 U. S. 283, holding that while evacuation of the Americans of Japanese ancestry was allowable under extreme war conditions, their detention after evacuation was not. We said:

"A citizen who is concededly loyal presents no problem of espio-

Nor obviously will the problem be solved if next year the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints.

The key to the problem is consideration of such applications *in a racially neutral way*. Abolition of the LSAT would be a start. The invention of substitute tests might be made to get a measure of an applicant's cultural background, perception, ability to analyze, and his or her relation to groups. They are highly subjective, but unlike the LSAT they are not concealed, but in the open. A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment. It will be necessary under such an approach to put more effort into assessing each individual than is required when LSAT scores and undergraduate grades dominate the selection process. Interviews with the applicant and others who know him is a time-honored test. Some schools currently run summer programs in which potential students who likely would be bypassed under conventional admissions criteria are given the opportunity to try their hand at law courses,[21] and certainly their performance in such programs could be weighed heavily. There is, moreover, no bar to considering an individual's prior achievements in

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nage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.*, at 302.

[21] See n. 3, *supra*.

light of the racial discrimination that barred his way, as a factor in attempting to assess his true potential for a successful legal career. Nor is there any bar to considering on an individual basis, rather than according to racial classifications, the likelihood that a particular candidate will more likely employ his legal skills to service communities that are not now adequately represented than will competing candidates. Not every student benefited by such an expanded admissions program would fall into one of the four racial groups involved here, but it is no drawback that other deserving applicants will also get an opportunity they would otherwise have been denied. Certainly such a program would substantially fulfill the Law School's interest in giving a more diverse group access to the legal profession. Such a program might be less convenient administratively than simply sorting students by race, but we have never held administrative convenience to justify racial discrimination.

The argument is that a "compelling" state interest can easily justify the racial discrimination that is practiced here. To many, "compelling" would give members of one race even more than *pro rata* representation. The public payrolls might then be deluged say with Chicanos because they are as a group the poorest of the poor and need work more than others, leaving desperately poor individual Blacks and whites without employment. By the same token large quotas of blacks or browns could be added to the Bar, waiving examinations required of other groups, so that it would be better racially balanced.[22]

[22] In *Johnson* v. *Committee on Examinations*, 407 U. S. 915, we denied certiorari in a case presenting a similar issue. There the petitioner claimed that the bar examiners reconsidered the papers submitted by failing minority applicants whose scores were close to the cutoff point, with the result that some minority appli-

The State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce Black lawyers for Blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans and not to place First Amendment barriers against anyone.[23] That is the point at the heart of all our

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cants were admitted to the Bar although they initially had examination scores lower than those of white applicants who failed.

As the Arizona Supreme Court denied Johnson admission summarily, in an original proceeding, there were no judicial findings either sustaining or rejecting his factual claims of racial bias, putting the case in an awkward posture for review here. Johnson subsequently brought a civil rights action in Federal District Court, seeking both damages and injunctive relief. The District Court dismissed the action and the Court of Appeals affirmed, holding that the lower federal courts did not have jurisdiction to review the decisions of the Arizona Supreme Court on admissions to the state bar. Johnson then sought review here and we denied his motion for leave to file a petition for mandamus, prohibition and/or certiorari on February 19, 1974. *Johnson* v. *Wilmer*, 415 U. S. 911. Thus in the entire history of the case no court had ever actually sustained Johnson's factual contentions concerning racial bias in the bar examiners' procedures. *DeFunis* thus appears to be the first case here squarely presenting the problem.

[23] Underlying all cultural background tests are potential ideological issues that have plagued bar associations and the courts. *In re Summers*, 325 U. S. 561, involved the denial of the practice of law to a man who could not conscientiously bear arms. The vote against him was five to four. *Konigsberg* v. *State Bar*, 353 U. S. 252, followed, after remand, by *Konigsberg* v. *State Bar*, 366 U. S. 36, resulted in barring one from admission to a state bar because of his refusal to answer questions concerning Communist Party member-

school desegregation cases, from *Brown* v. *Board of Education*, 347 U. S. 483, through *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1. A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that Blacks or Browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.

If discrimination based on race is constitutionally permissible when those who hold the reins can come up with "compelling" reasons to justify it, then constitutional guarantees acquire an accordionlike quality. Speech is closely brigaded with action when it triggers a fight, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, as shouting "fire" in a crowded theater triggers a riot. It may well be that racial strains, racial susceptibility to certain diseases, racial sensitiveness to environmental conditions that other races do not experience, may in an extreme situation justify differences in racial treatment that no fairminded person would call "invidious" discrimination. Mental ability is not in that category. All races can compete fairly at all professional levels. So

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ship. He, too, was excluded five to four. The petitioner in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, was, however, admitted to practice even though he had about 10 years earlier been a member of the Communist Party. But in *In re Anastaplo*, 366 U. S. 82, a five-to-four decision, barred a man from admission to a state bar not because he invoked the Fifth Amendment when asked about membership in the Communist Party, but because he asserted that the First Amendment protected him from that inquiry. *Baird* v. *State Bar of Arizona*, 401 U. S. 1, held by a divided vote that a person could not be kept out of the state bar for refusing to answer whether he had ever been a member of the Communist Party; and see *In re Stolar*, 401 U. S. 23.

far as race is concerned, any state-sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

The problem tendered by this case is important and crucial to the operation of our constitutional system; and educators must be given leeway. It may well be that a whole congeries of applicants in the marginal group defy known methods of selection. Conceivably, an admissions committee might conclude that a selection by lot of, say, the last 20 seats is the only fair solution. Courts are not educators; their expertise is limited; and our task ends with the inquiry whether, judged by the main purpose of the Equal Protection Clause—the protection against racial discrimination [24]—there has been an "invidious" discrimination.

We would have a different case if the suit were one to displace the applicant who was chosen in lieu of DeFunis. What the record would show concerning his potentials would have to be considered and weighed. The educational decision, provided proper guidelines were used, would reflect an expertise that courts should honor. The problem is not tendered here because the physical facilities were apparently adequate to take DeFunis in addition to the others. My view is only that I cannot say by the tests used and applied he was invidiously discriminated against because of his race.

I cannot conclude that the admissions procedure of the Law School of the University of Washington that excluded DeFunis is violative of the Equal Protection Clause of the Fourteenth Amendment. The judgment of the Washington Supreme Court should be vacated and the case remanded for a new trial.

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[24] See *Slaughter House Cases*, 16 Wall. 36, 81.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

The following are excerpts from the Law School's current admissions policy, as provided to the Court by counsel for the respondents.

ADMISSIONS

A. Policy Statement Regarding Admission to Entering Classes of Juris Doctor Program—Adopted by the Law Faculty December 4, 1973.

§ 1. The objectives of the admissions program are to select and admit those applicants who have the best prospect of high quality academic work at the law school and, in the minority admissions program described below, the further objective there stated.

§ 2. In measuring academic potential the law school relies primarily on the undergraduate grade-point average and the performance on the Law School Admission Test (LSAT). The weighting of these two indicators is determined statistically by reference to past experience at this school. For most applicants the resulting applicant ranking is the most nearly accurate of all available measures of relative academic potential. In truly exceptional cases, *i. e.*, those in which the numerical indicators clearly appear to be an inaccurate measure of academic potential, the admission decision indicated by them alone may be altered by a consideration of the factors listed below. The number of these truly exceptional cases in any particular year should fall somewhere from zero to approximately forty. These factors are used, however, only as an aid in assessing the applicant's academic potential in its totality, without undue emphasis or reliance upon one or a few and without an attempt to quantify in advance the strength of their

application, singly or as a whole, in a particular case. They are:

a) the difficulty or ease of the undergraduate curriculum track pursued;

b) the demanding or non-demanding quality of the undergraduate school or department;

c) the attainment of an advanced degree, the nature thereof, and difficulty or ease of its attainment;

d) the applicant's pursuits subsequent to attainment of the undergraduate degree and the degree of success therein, as bearing on the applicant's academic potential;

e) the possibility that an applicant many years away from academic work may do less well on the LSAT than his or her counterpart presently or recently in academic work;

f) substantial change in mental or physical health that indicates prospect for either higher or lower quality of academic work;

g) substantial change in economic pressures or other circumstances that indicates prospect for either higher or lower quality of academic work;

h) exceptionally good or bad performance upon the writing test ingredient of the LSAT, if the current year's weighting of the numerical indicators does not otherwise take the writing score into account;

i) the quality and strength of recommendations bearing upon the applicant's academic potential;

j) objective indicators of motivation to succeed at the academic study of law;

k) variations in the level of academic achievement over time; and

l) any other indicators that serve the objective stated above.

. . . .

§ 6. Because certain ethnic groups in our society

have historically been limited in their access to the legal profession and because the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem.

Qualified minority applicants are therefore admitted under the minority admissions program in such number that the entering class will have a reasonable proportion of minority persons, in view of the obligation stated above and of the overall objective of the law school to provide legal education for qualified persons generally. For the purpose of determining the number to be specially admitted under the program, and not as a ceiling on minority admissions generally, the faculty currently believes that approximately 15 to 20 percent is such a reasonable proportion if there are sufficient qualified applicants available. Under the minority admissions program, admission is offered to those applicants who have a reasonable prospect of academic success at the law school, determined in each case by considering the numerical indicators along with the listed factors in Section 2, above, but without regard to the restriction upon number contained in that section.

No particular internal percentage or proportion among various minority groups in the entering class is specified; rather, the law school strives for a reasonable internal balance given the particular makeup of each year's applicant population.

As to some or all ethnic groups within the scope of the minority admissions program, it may be appropriate to give a preference in some degree to residents of the state; that determination is made each year in view of

all the particulars of that year's situation, and the preference is given when necessary to meet some substantial local need for minority representation.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

I respectfully dissent. Many weeks of the school term remain, and petitioner may not receive his degree despite respondents' assurances that petitioner will be allowed to complete this term's schooling regardless of our decision. Any number of unexpected events—illness, economic necessity, even academic failure—might prevent his graduation at the end of the term. Were that misfortune to befall, and were petitioner required to register for yet another term, the prospect that he would again face the hurdle of the admissions policy is real, not fanciful; for respondents warn that "Mr. DeFunis would have to take some appropriate action to request continued admission for the remainder of his law school education, and *some discretionary action by the University on such request would have to be taken.*" Respondents' Memorandum on the Question of Mootness 3–4 (emphasis supplied). Thus, respondents' assurances have not dissipated the possibility that petitioner might once again have to run the gantlet of the University's allegedly unlawful admissions policy. The Court therefore proceeds on an erroneous premise in resting its mootness holding on a supposed inability to render any judgment that may affect one way or the other petitioner's completion of his law studies. For surely if we were to reverse the Washington Supreme Court, we could insure that, if for some reason petitioner did not graduate this spring, he would be entitled to re-enrollment at a later time on the same basis as others who have not faced the hurdle of the University's allegedly unlawful admissions policy.

In these circumstances, and because the University's position implies no concession that its admissions policy is unlawful, this controversy falls squarely within the Court's long line of decisions holding that the "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case." *United States* v. *Phosphate Export Assn.*, 393 U. S. 199, 203 (1968); see *Gray* v. *Sanders*, 372 U. S. 368 (1963); *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953); *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. 37 (1944); *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257 (1938); *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 (1897). Since respondents' voluntary representation to this Court is only that they will permit petitioner to complete this term's studies, respondents have not borne the "heavy burden," *United States* v. *Phosphate Export Assn.*, *supra*, at 203, of demonstrating that there was not even a "mere possibility" that petitioner would once again be subject to the challenged admissions policy. *United States* v. *W. T. Grant Co.*, *supra*, at 633. On the contrary, respondents have positioned themselves so as to be "free to return to [their] old ways." *Id.*, at 632.

I can thus find no justification for the Court's straining to rid itself of this dispute. While we must be vigilant to require that litigants maintain a personal stake in the outcome of a controversy to assure that "the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution," *Flast* v. *Cohen*, 392 U. S. 83, 106 (1968), there is no want of an adversary contest in this case. Indeed, the Court concedes that, if petitioner has lost his stake in this controversy, he did so only when he

registered for the spring term. But petitioner took that action only after the case had been fully litigated in the state courts, briefs had been filed in this Court, and oral argument had been heard. The case is thus ripe for decision on a fully developed factual record with sharply defined and full[y] canvassed legal issues. Cf. *Sibron* v. *New York*, 392 U. S. 40, 57 (1968).

Moreover, in endeavoring to dispose of this case as moot, the Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations, and colleges and universities, as evidenced by the filing of twenty-six *amicus curiae* briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court. Cf. *Richardson* v. *Wright*, 405 U. S. 208, 212 (1972) (dissenting opinion). Because avoidance of repetitious litigation serves the public interest, that inevitability counsels against mootness determinations, as here, not compelled by the record. Cf. *United States* v. *W. T. Grant Co.*, *supra*, at 632; *Parker* v. *Ellis*, 362 U. S. 574, 594 (1960) (dissenting opinion). Although the Court should, of course, avoid unnecessary decisions of constitutional questions, we should not transform principles of avoidance of constitutional decisions into devices for sidestepping resolution of difficult cases. Cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 404–405 (1821) (Marshall, C. J.).

On what appears in this case, I would find that there is an extant controversy and decide the merits of the very important constitutional questions presented.